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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-5195

MICHAEL JONES,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

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DISTRICT OF COLUMBIA COURT OF APPEALS

The petitioner, Michael Jones, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the District of Columbia Court of Appeals entered in the proceeding on May 29, 1981.

QUESTIONS PRESENTED

1. Whether a criminal defendant found not guilty by reason of insanity of attempted petit larceny -- a misdemeanor -- can, consistent with due process, be confined indefinitely to a mental hospital on the basis of that finding alone.

2. Whether it is denial of equal protection to confine in a mental hospial a defendant found not guilty by reason of insanity for a period longer than he could have been incarcerated upon conviction of the offense, without affording him the procedural protections afforded civil committees.

OPINION BELOW

The two panel opinions of the District of Columbia Court of Appeals are reported at 396 A.2d 183 (1978) and 411 A.2d 624 (1980). The en banc opinion is reported in slip opinion No. 11918 (D.C. Ct. App. May 29, 1981). The three opinions are reproduced infra, at appendices A, B, and C respectively.

JURISDICTION

The en banc judgment of the Court of Appeals was entered on May 29, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

STATUTE INVOLVED

24 D.C. Code § 301(d) and 21 D.C. Code § 545(b). These sections are reproducted at footnotes 1 and 2 of the en banc opinion of the court below.

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STATEMENT OF THE CASE

Petitioner, Michael Jones, was arrested on September 19, 1975 and charged with attempted petit larceny for trying to steal a coat from a department store. On September 22, 1975, following his arraignment on a misdemeanor information, he was ordered to Saint Elizabeths Hospital for a mental examination. After a three and half month delay, during which Mr. Jones was jailed pending bed space at the hospital, he was transferred to St. Elizabeths, where he remained for about one month. On March 12, 1976, Mr. Jones was brought back to court. The examining physician testified that Mr. Jones was competent for trial, but that, on the date of the alleged offense, he was suffering from a mental disease which substantially impaired his behavior controls, and that the alleged offense, if committed by him, was the product of his mental disease. In an uncontested non-jury proceeding, the trial court then found Mr. Jones not guilty of attempted petit larceny by reason of insanity. Mr. Jones was then recommitted to Saint Elizabeth Hospital pursuant to 24 D.C. Code § 301(d)(1).

On May 25, 1976, after a series of continuances, Mr. Jones appeared before the Superior Court of the District of Columbia for a hearing pursuant to 24 D.C. Code § 301(d)(2). After hearing testimony of a St. Elizabeths psychologist the court found that Mr. Jones had failed to establish that he was neither dangerous to himself or others, and, based on that finding, ordered Mr. Jones committed to the Hospital for an indeterminate period.

After several delays and filings on behalf of both parties, the case again came on for a hearing on February 22, 1977, this time before another judge of Superior Court. Counsel for Mr. Jones argued that Mr. Jones had already been confined many months longer than the maximum sentence he could have received

had he been convicted of the attempted larceny charge, and that his commitment pursuant to 24 D.C. Code § 301(d)(2) therefore had to be vacated. The court denied Mr. Jones' motion, and without receiving any medical testimony or any other evidence of Mr. Jones' condition at that time, affirmed the May 25, 1976 order of commitment.

On appeal to the District of Columbia Court of Appeals the petitioner argued that his confinement was unconstitutional. Petitioner contended that when he was initially committed, following his insanity acquittal, he had not been afforded the procedural protections guaranteed to putative civil committees under 21 D.C. Code 545; that is, he argued that he was committed without the government proving by the requisite standard of proof -- at that time in the District that standard was proof beyond a reasonable doubt 1/ -- the requisite elements of committability -- then, and now, dangerousness to self or others due to a mental illness. Instead, his initial commitment was premised solely on his acquittal by reason of insanity of the charge of attempted petit larceny. This acquittal, petitioner argued, did not establish present mental illness or dangerousness at all, and established only past mental illness by a preponderance of the evidence. Petitioner argued that if this lower leven of proof could be

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1/ The District of Columbia Court of Appeals had ruled that civil commitment required the government to establish mental illness and dnagerousness by proof beyond a reasonable doubt. In re Hodge, D.C. App., 325 A.2d 605 (1974). After this Court's decision in Addington v. Texas, 441 U.S. 418 (1979), the court of appeals adopted the minimum constitutional standard of proof by clear and convincing evidence. In re Nelson, D.C. App., 408 A.2d 1233 (1979).

justified at all, it was only on the basis that he had been proved to have committed the acts constituting petit larceny, while a civil committee has not necessarily been proved to have committed a criminal act. But, petitioner maintained, even if the initial disparity could be justified on this basis, the justification evaporated once he had been confined for the one year for which he could have been incarcerated upon conviction; and so, after that one year, the government had to prove his committability under the civil commitment statute, 21 D.C. Code 545, or release him.

For his argument petitioner relied on a series of decisions of this Court, particularly Baxstrom v. Herold, 383 U.S. 107 (1966); Specht v. Patterson, 386 U.S. 605 (1967); Humphrey v. Cady, 405 U.S. 504 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); and McNeil v. Director, Patuxent Institution, 407 U.S. 245; and on a series of decisions of the United States Court of Appeals for the District of Columbia Circuit, particularly, Bolton v. Harris, 130 U.S. App. D.C. 1, 395 F.2d 692; Waite v. Jacobs, 154 U.S. App. D.C. 281, 475 F.2d 392; and United States v. Brown, 155 U.S. App. D.C. 402, 478 F.2d 606. These cases, petitioner argued, stood generally for the proposition that a criminal charge, whether pending (e.g., Jackson v. Indiana), culminating in a conviction (e.g., Baxstrom v. Herold; Cady v. Humphey); or culminating in an insanity acquital (e.g., Bolton v. Harris; United States v. Brown) cannot justify a commitment beyond that authorized as the penalty for the crime itself unless the defendant is afforded the procedural protections guaranteed to putative civil committees.2/

2/ In Jackson, because the defendant had not been found even to have committed a criminal act, he could not be confined, except for examination, on the basis of the criminal charge.

The Court of Appeals panel initially found for the government. The panel majority ruled that by failing to challenge his initial commitment, petitioner had thereby conceded that it was "not based, even in part, on punitive considerations." Thus, the court reasoned, petitioner had conceded that his commitment was purely therapeutic; and, as such, its duration could bear no rational relationship to the prison term that could have been imposed upon conviction. The panel strongly hinted that an attack on the constitutionality of petitioner's initial commitment might well succeed on the theory that it was punitive and thus invalid under Baxstrom v. Herold, supra.

Petitioner sought rehearing, arguing that by attacking his continued confinement he was implicitly attacking his initial commitment as well -- if that commitment was construed as an indeterminate one. That is, petitioner's argument was that an indeterminate commitment based solely on his insanity acquittal of petit larceny was unconstitutional, and that even if the commitment was valid if construed as lasting only for the period he could have been incarcerated upon conviction -- here, one year -- that period had long since passed, and so, however the commitment was construed, it was now an unconstitutional basis on which to continue to confine him.

The panel granted rehearing, and reversed itself. The panel majority concluded that the petitioner's commitment was based in part on a punitive purpose, and because it was also premised on a lesser showing than that required for an indeterminate civil commitment, it could not persist beyond the maximum one year penal term which is authorized for attempted petit larceny. Thus the panel ordered the government either to seek petitioner's civil commitment, or to release him.

It was now the government's turn to file a petition for rehearing, which the court granted, and, upon rehearing en banc, the court reversed the panel's second decision and upheld the petitioner's continued confinement under his initial commitment. The majority concluded that petitioner's commitment was non-punitive, and that the diminished procedural safeguards accorded the petitioner could be rationally justified by the situational difference between those whom the state seeks to commit civilly and those whom it commits on the basis of a finding of not guilty by reason of insanity. The majority then distinguished in a rather wooden, and unconvincing manner, the cases on which petitioner had relied.

Three judges dissented, and agreed with the petitioner's argument that his continued confinement was unconstitutional.

REASONS FOR GRANTING THE WRIT

This case raises a fundamental constitutional issue that has never been directly resolved by this Court; namely, whether a defendant found not guilty by reason of insanity of a non-violent misdemeanor can be committed to a mental hospital on the basis of that finding alone, and, if he can be, whether the commitment based on that finding can be an indeterminate one that persists for longer than the period for which the defendant could have been incarcerated had he been convicted rather than acquitted. While this issue has not been definitively resolved, in petitioner's view the decision of the court below upholding such an indeterminate commitment, clearly conflicts with a series of decisions by this Court, which demonstrate that the petitioner's continued confinement denies him his constitutional rights to due process

and to equal protection. Moreover, the decision below directly conflicts with decisions which are controlling in the United States Court of Appeals for the District of Columbia Circuit, which court is charged with enforcing the very same commitment statute at issue here. Consequently if this conflict is not resolved, insanity acquittees in the federal courts of the District of Columbia will be treated differently from acquittees in the local courts, even though all are subject to commitment to the same hospital under the same statute. Finally, the constitutional question at issue here is one that will recur frequently until it is resolved by this Court, and it has already been recently faced by several state courts.

ARGUMENT

On September 19, 1975, Michael Jones was arrested for trying to steal a coat from a department store. Had the government proved Mr. Jones guilty of this offense, he could have been imprisoned for at most one year. But Mr. Jones was not found guilty. He was acquitted because the fact finder was convinced by a preponderance of the evidence that at the time of the offense Mr. Jones was mentally ill and not criminally responsible for his acts. As a result of this finding that he was not blameworthy, Mr. Jones has now been confined against his will not for one year, but so far, for almost six years. And he faces the prospect of being so confined for the rest of his life. Yet at no time has the government proved the need for that confinement. For under 24 D.C. Code 301(d), a person found not guilty by reason of insanity, of any crime whatever, is automatically committed to a mental hospital until he can prove that he is neither mentally ill nor dangerous.

In petitioner's view this automatic, indeterminate commitment is unconstitutional as applied to him for two reasons. First, the petitioner's initial commitment was invalid because he was never proven to be committable by clear and convincing evidence, as Addington v. Texas, 441 U.S. 418 (1979) requires that he be. Second, even if his initial commitment was valid, his continued confinement beyond the one year that he could have served upon conviction of petit larceny constitutes a denial of equal protection of the laws; for he is being confined longer than those defendants actually convicted of attempted petit larceny on the theory that he is not being punished but "civilly" committed; yet at the same time he has not been afforded the procedural protections to which a civil committee is constitutionally and statutorally entitled.

(1) To obtain a civil commitment order in the District of Columbia, the government must prove that the putative committee is mentally ill and, as a result, dangerous to himself or others. 21 D.C. Code 545. This Court made clear in Addington v. Texas, supra, that due process requires that committability be proved by clear and convincing evidence before a person can be confined indefinitely to a mental hospital. Here, all that the government proved with respect to Michael Jones was that at the time he committed the acts constituting attempted petit larceny he was mentally ill -- and even this was proved only by a preponderance of the evidence. 3/ His dangerousness was never proved by the government at all, by any standard. The Court of Appeals effectively ruled that proof of the commission of any criminal

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3/ The 1970 amendments to 24 D.C. Code 301(j) place the burden on the defendant to prove insanity by a preponderance of the evidence. Thus it is true that the finding of not guilty by reason of insanity does constitute an affirmative finding of past mental illness.

act beyond a reasonable doubt, coupled with a finding by a preponderance of the evidence that it was committed as the result of a mental illness, can substitute for the level of proof which Addington requires, of present committability by clear and convincing evidence. 4/ This is simply irrational. Not all criminal acts demonstrate the sort of dangerousness which can justify an indeterminate confinement to a mental hospital under the District of Columbia's civil commitment statute. And, appellant submits, an attempted petit larceny clearly does not by itself, establish the requisite dangerousness for such a commitment. Yet petitioner's indeterminate commitment is premised solely on the fact that he tried to steal a coat because he was mentally ill. And even his mental illness was not proved by the standard required in Addington, for all the uncontested insanity defense established was that at the time the appellant tried to steal the coat he probably was suffering from a mental illness. His present mental illness was not proved at all, and even his past mental illness was not proved by clear and convincing evidence. Thus neither the dangerousness facet nor the mental illness facet of committability was proved by the standard required under Addington, and so the petitioner's commitment denied him due process of law.

4/ Although 24 D.C. Code 301(d)(1) does not set out any criteria of committability, i.e., commitment is automatic whenever the defendant successfully raises an insanity defense in any criminal prosecution, it is clear that it presupposes a commitment based on mental illness and dangerousness. For to gain release under 24 D.C. Code 301(d)(2)(B) or 301(k), the acquittee must prove that he is no longer mentally ill or dangerous.

(2) The finding that petitioner was not guilty by reason of insanity of attempted petit larceny establishes beyond a reasonable doubt that he committed the act constituting that offense. It also establishes by a preponderance of the evidence that he committed the act because he was mentally ill. Petitioner has argued that commitment on this basis is a denial of due process because this finding does not itself demonstrate the need for commitment by clear and convincing evidence. But even if proof of the commission of a criminal act can justify confinement, just as conviction would justify incarceration, and even if the finding of past mental illness can justify confinement in a hospital, rather than a jail, still, that confinement is a denial of the equal protection 5/ if it persists beyond the one year that those convicted of attempted petit larceny could be incarcerated.

Although there are several decisions of this Court that demonstrate that this is so, the case which is most directly on point is Baxstrom v. Herold, 383 U.S. 107 (1966), which the majority below all but ignores. 6/

In Baxstrom, the petitioner was convicted of assault and sentenced to 2-1/2 to 3 years in prison. While serving his term he was certified insane and transferred to a mental hospital under the jurisdiction of the New York State Department of Corrections. Like appellant here, Baxstrom did not challenge his initial commitment to the hospital. He argued, however, that he could not be kept in the hospital beyond the term to which he had been sentenced unless he was, at the expiration of his term, found committable by a jury just as a putative civil committee would

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5/ The right to equal protection of the laws is guaranteed under the Fifth Amendment's due process clause. Bolling v. Sharpe, 347 U.S. 497 (1954).

6/ There are decisions from the United States Court of Appeals which are controlling on that court and which are directly contrary to the holding of the District of Columbia Court of Appeals in this case. See Waite v. Jacobs, supra, and United States v. Brown, supra.

have to be so found under New York's civil commitment statute. He argued that the New York statute authorizing his continued confinement upon a finding by a judge without jury review denied him equal protection of the laws. The Supreme Court agreed and struck down the statute as unconstitutional.

Baxstrom was found guilty of a violent crime. The appellant here was not even accused of a violent crime. Baxstrom was certified by a psychiatrist to be presently insane at the time he was initially committed to the mental hospital. The appellant's initial commitment here was automatic; he was not found by a judge or jury -- or even certified by a psychiatrist -- to be presently mentally ill either at the time of his initial commitment or at any time since.7/ Baxstrom's confinement beyond his sentence was authorized only upon a finding by a judge that the state had demonstrated by a preponderance of the evidence that he was in need of care and treatment -- the same standard as applied in New York to putative civil committees. Appellant here has never been found presently mentally ill and dangerous -- the civil commitment standard in the District -- by a judge or jury. Yet, on the theory of the court below, the appellant here, unlike Baxstrom, can be detained indefinitely without the state ever having to prove mental illness or dangerousness. This is clearly contrary to the teaching of Baxstrom.

7/ It is true that at a hearing in March, 1976, a clinical psychologist testified that she felt that the appellant was mentally ill. This hearing was, of course, in no way equivalent to a civil commitment hearing. Moreover, on the government's theory the judge could have ordered the appellant's continued confinement merely on the basis of a presumption of "continuing" mental illness and dangerousness with no supporting testimony or evidence whatever. The "presumption" is untenable for the reasons appellant has explained, i.e., its major premise -- that the appellant was found to be mentally ill and dangerous to begin with -- is simply false.

The court below sought to justify its holding by minimizing the differences between the procedural protections accorded a putative civil committee under 21 D.C. Code 545, and those provided a defendant found not guilty by reason of insanity under 24 D.C. Code 301. In fact, these differences are crucial; for, quite simply, under 21 D.C. Code 545 the state must prove that the individual it seeks to confine is committable, while under 24 D.C. Code 301, the individual is automatically confined unless and until he can prove that he is not committable. As this Court recognized in Addington, the burden of proof where a psychiatric diagnosis is involved is inherently difficult to meet, whoever bears it. Thus, as the United States Court of Appeals put it in Waite v. Jacobs, supra, "in cases [involving] psychiatric testimony, which is 'often unclear, sometimes woefully muddled' . . . the allocation of burden of proof can be outcome determinative."8/

Moreover, the differences in the procedural protections at issue here, are far greater than those which this Court held in Baxstrom resulted in a denial of equal protection.

Baxstrom's confinement beyond the term of the original sentence required the state to prove the need for such continued confinement. In fact the only difference between the procedure which New York provided for those whose commitment the state sought to extend beyond their prison sentences and those whom it sought to commit civilly initially was the availability to the latter of a de novo jury trial on sanity. Since under the court of appeals' reading of 24 D.C. Code § 301 the commitment is automatic and no hearing at which the government must prove anything is ever required, the denial of equal protection here is an a fortiori case.

8/ Indeed, it seems to have been so here; for when the panel below ordered the government either to seek the petitioner's civil commitment or to release him, the government released him, apparently because it felt it could not prove him committable. But at the same time, petitioner has consistently been unable to prove that he should be released. Petitioner is currently committed on the basis of his original commitment under 24 D.C. Code 301(d), so the case is not moot.

The court of appeals simply failed to come to grips with this Court's decision in Baxstrom. The only differences between that case and this all point in the petitioner's favor, for surely he cannot, consistent with equal protection, be treated more harshly upon his acquittal than Baxstrom, and those like him, can be treated upon conviction. And although the dissent convincingly demonstrates that 24 D. C. Code 301(d) has a partially punitive purpose, 9/ even if it did not, it unquestionably results in a denial of equal protection by treating insanity acquittees more harshly in terms of duration of confinement than defendants convicted of the same criminal offense and without the procedural safeguards accorded to putative civil committees. Petitioner cannot, in other words, be denied the protections accorded both a convicted criminal and a putative civil committee simply because he successfully raises an insanity defense. Yet Mr. Jones has now been involuntarily confined for nearly six years for trying to steal a coat even though the state has never proved that he is in need of such confinement. This treatment constitutes a denial of both due process and equal protection.

9/ 24 D.C. Code 301(d) also irrationally penalizes those defendants who choose to raise an insanity defense (and prevail), for the sections automatic commitment procedure does not apply where the insanity defense is imposed by the court. Yet the state's interest in committing the insanity acquittee, whether the defense is raised or imposed, is of course identical.

CONCLUSION

For these reasons the writ of certiorari should issue to review the judgment and opinion of the District of Columbia Court of Appeals.

Respectfully submitted,

WILLIAM J. MERTENS

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PETITION FOR A WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Michael Jones, respectfully moves pursuant to Rules of this Court for leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. As grounds for this request, petitioner asserts:

1. Petitioner is filing this 6th day of August, 1981, a petition for writ of certiorari to review the judgment and opinion of the District of Columbia Court of Appeals, which affirmed his commitment by the Superior Court of the District of Columbia.

2. Counsel was appointed to represent the petitioner in the Superior Court and in the Court of Appeals under the District of Columbia Criminal Justice Act, 11 D.C. Code §2601 et seq.

3. Because of his poverty, petitioner is unable to pay or the costs of this case and is unable to give security for the same.

4. The attached petition seeks review of the decision of the Court of Appeals that the Constitution permits committing petitioner indefinitely to St. Elizabeths Hospital on the strength of his acquittal by reason of insanity of a misdemeanor charge of attempted petit larceny, which would have carried a maximum jail term of one year had he been found guilty, even though the government never subsequently bore the burden of demonstrating that he was mentally ill or dangerous.

WHEREFORE, for these reasons, petitioner respectfully requests leave to proceed in forma pauperis.

Respectfully submitted,

WILLIAM J. MERTENS

SILAS J. WASSERSTROM
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451 Indiana Avenue, N.W.
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628-1200

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of Petitioners' Motion for Leave to Proceed in Forma Pauperis has been served by hand upon the Honorable Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530, and upon John A. Terry, Esquire, Chief, Appellate Division, U.S. Attorney's Office, this 6th day of August, 1981.

SILAS J. WASSERSTROM

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 11918

MICHAEL A. JONES, APPELLANT,

v.

UNITED STATES, APPELLEE.

Appeal from the Superior Court of the District of Columbia

(Hon. Eugene N. Hamilton, Hearing Judge)

(Argued December 5, 1977 Decided November 28, 1978)

Silas J. Wasserstrom, Public Defender Service, with whom *Alan F. Greenwald*, Public Defender Service, was on the brief, for appellant.

Joel S. Perwin, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney, and *John A. Terry*, Assistant United States Attorney, were on the brief, for appellee.

Before KELLY, MACK, and FERREN, *Associate Judges*.

Associate Judge MACK concurs at page 17.

FERREN, *Associate Judge*: The trial court found appellant Michael Jones not guilty of petit larceny by reason of insanity. After a "release hearing," D.C. Code

1973, § 24-301(d), the court committed Mr. Jones indefinitely to St. Elizabeths Hospital. This case presents one question: whether Michael Jones is constitutionally entitled to release from St. Elizabeths upon expiration of the maximum period for which he could have been imprisoned (in this case one year), unless the government carries the burden of proving, at a civil commitment hearing, D.C. Code 1973, § 21-545(b), that Mr. Jones is still mentally ill and dangerous to self or others.

Appellant does not challenge the validity of his initial commitment to St. Elizabeths after the "release hearing." On the assumption, therefore, that this commitment was lawful, we can perceive no constitutional requirement that appellant be released or civilly committed at the end of the maximum imprisonment period, for that period bears no relationship to the unchallenged basis for appellant's hospital confinement: that he is mentally ill, is dangerous to self or others, and should receive treatment until he is well enough for release. We therefore affirm the denial of appellant's motion for civil commitment or release.

I.

On September 19, 1975, the police arrested Michael Jones for attempting to steal a coat from a department store. The next day the government charged him with attempted petit larceny; and, following a competency examination yielding a finding of mental illness, he was arraigned and ordered to St. Elizabeths for mental observation pursuant to D.C. Code 1973, § 24-301(a). He remained in the District of Columbia jail for four and one-half months until bed space became available at St. Elizabeths on February 4, 1976.

Following the observation period, appellant went to trial on stipulated facts. In an uncontested proceeding,

the trial judge entered a judgment of not guilty by reason of insanity. Thereafter, he recommitted appellant to St. Elizabeths temporarily, pursuant to D.C. Code 1973, § 24-301(d)(1). On May 25, 1976, appellant was afforded his § 24-301(d)(2) "release hearing," at which the court determined that he was mentally ill and likely to be dangerous to himself or others in the reasonable future. The court accordingly continued his commitment to St. Elizabeths—indefinitely.

At this juncture the procedural history of the case becomes murky. Apparently, upon conclusion of the May 25 proceeding, the court ordered a further hearing for November 29, 1976. When that date arrived appellant's counsel appeared before Judge Hamilton and orally requested that appellant be released—or civilly committed—since his cumulative hospital confinement had exceeded the one-year maximum period of incarceration for attempted petit larceny. No attorney appeared for the government. The judge responded with an order that the government either pursue civil commitment or show cause why the "criminal commitment" should not be vacated by January 18, 1977.

During the seven-week period which followed, it appears that the government initiated the civil commitment process—resulting in a recommendation of such commitment by the staff of St. Elizabeths—and then changed course, deciding to contest the court's order. The government persuaded the court to modify its order by requiring appellant to file a written motion for civil commitment or release, and by allowing the government time to respond.

The matter came on for hearing on February 22, 1977. After extended argument, the court denied appellant's motion and reaffirmed the findings of May 25, *i.e.*, that

appellant was mentally ill and likely to be dangerous. Appellant noted an appeal and, on June 14, 1977, filed a motion in this court for summary reversal. The government responded with a motion for summary affirmance. The motions division of this court rejected both requests for summary disposition. Instead, we ordered expedited oral argument on the appeal. After argument before this division of the court, we called for post-argument briefs.

In his final brief, appellant confirms the narrow scope of the question presented in this appeal. "[A]ppellant's position has been, and remains, . . . that *even if* an automatic commitment following an insanity acquittal is *permissible*, continued confinement beyond a certain point of time—at the latest when the prison sentence which could have been imposed had the defendant been convicted has run—is constitutionally *impermissible* unless the government can prove the necessity of such continued confinement just as it would have to prove the necessity where it seeks civil commitment" (emphasis in original). Thus, we are not confronted with a challenge to the process for initial commitment which ordinarily follows an insanity acquittal. We are faced only with the constitutional propriety of hospitalization beyond the period of a maximum prison term, absent invocation of the protections of the civil commitment process.

II.

According to appellant, the principles of *Baxstrom v. Herold*, 383 U.S. 107 (1966), *Bolton v. Harris*, 130 U.S. App.D.C. 1, 395 F.2d 642 (1968), and, more directly, *Waite v. Jacobs*, 154 U.S.App.D.C. 281, 475 F.2d 392 (1973), mandate a conclusion that the equal protection clause is transgressed when insanity acquitees are held beyond their maximum potential terms of imprisonment

without the intervention of civil commitment procedures.[1] To comprehend his argument fully, a brief history is in order.

Prior to the circuit court's 1968 *Bolton* decision, a successful insanity plea resulted in automatic, indeterminate confinement to a mental hospital. Because there was no required judicial review of such confinements, the "statutory scheme would [have] conceivably allow[ed] a patient committed under [D.C. Code 1967, § 24-301(d)] to remain in the hospital for the rest of his life without a judicial determination that he [was] mentally ill or that he [was] still likely to commit dangerous acts." *Bolton*, *supra* at 7, 395 F.2d at 648. At that time, however, as today, the 1964 Hospitalization of the Mentally Ill Act, D.C. Code 1973, §§ 21-541 to -545, provided numerous protections for civilly committed persons—including, significantly, the right to a jury trial with the burden on the government to prove mental illness and dangerousness beyond a reasonable doubt. In *Bolton*, therefore, the circuit court explored the "sharp contrast" between the two commitment schemes in light of the Supreme Court's *Baxstrom* principle "that the commission of criminal acts does not give rise to a presumption of dangerousness which, standing alone, justifies substantial difference in commitment procedures and confinement conditions for the mentally ill." *Bolton*, *supra* at 6, 395 F.2d at 647. Concluding that the differences between the two groups, insanity acquitees and civil commitees, could not constitutionally support most of the

[1] The Fifth Amendment's due process clause includes an equal protection safeguard against federal and District of Columbia governmental actions. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Davis v. Washington*, 168 U.S.App.D.C. 42, 43 n.2, 512 F.2d 956, 957 n.2 (1975), *rev'd on other grounds*, 426 U.S. 229 (1976).

differences in procedure, the court read most of the 1964 Act's civil commitment safeguards into the "insane criminal" commitment scheme.[2] Thereafter, acquitees were entitled to a "*Bolton* hearing" after trial: "a judicial hearing with procedures substantially similar to those in civil commitment proceedings." *Id.* at 10, 395 F.2d at 651 (footnote omitted).

In 1970, however, Congress responded to the *Bolton* decision by amending § 24-301 of the D.C. Code. Dissatisfied with the anticipated consequences of *Bolton*, Congress attempted to accommodate the acquitee's constitutional rights and provide rehabilitative opportunities while protecting the public against anticipated danger. *United States v. Jackson*, 179 U.S.App.D.C. 375, 381, 553 F.2d 109, 115 (1976). By the terms of the amended, and currently applicable, § 24-301, an insanity acquitee once again faces automatic commitment:

> If any person tried upon an indictment or information for an offense raises the defense of insanity and is acquitted solely on the ground that he was insane at the time of its commission, he shall be committed to a hospital for the mentally ill until such time as he is eligible for release pursuant to this subsection or subsection (e). [D.C. Code 1973, § 24-301(d)(1).]

The next paragraph of the statute, however, eliminates the pre-*Bolton* possibility of indeterminate commitment without judicial review. Congress provided for an automatic, legislatively tailored "release hearing" within 50 days of the § 24-301(d)(1) commitment:

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[2] The court expressly permitted two distinctions to continue: (1) automatic, temporary commitment of acquitees and (2) mandatory court review of a hospital's release decision for acquitees. *Bolton*, *supra* at 10-11, 395 F.2d at 651-52.

> A person confined pursuant to paragraph (1) shall have a hearing, unless waived, within 50 days of his confinement to determine whether he is entitled to release from custody. . . . If the hearing is not waived, the court shall cause notice of the hearing to be served upon the person, his counsel, and the prosecuting attorney and hold the hearing. Within ten days from the date the hearing was begun, the court shall determine the issues and make findings of fact and conclusions of law with respect thereto. [D.C. Code 1973, § 24-301(d)(2), in relevant part.]

Additionally, the 1970 amendments provided for habeas corpus relief, § 24-301(g), as well as for a more specific motion mechanism for seeking release (no more often than every six months), § 24-301(k).

As we have noted, however, the major impetus for legislative action was anxiety about the *Bolton* limitation on the ability to continue commitment of those who successfully interpose insanity defenses to criminal charges. Thus, for our purposes here, the most notable features of the 1970 amendments are not the new procedures afforded acquitees but the omitted or retracted guarantees which had been extended by the *Bolton* decision. It is the differences between the post-1970 "modified *Bolton*" scheme under which appellant was committed and has continued to be confined, D.C. Code 1973, § 24-301, and the current civil commitment processes, D.C. Code 1973, § 21-501 *et seq.*, which had been extended to acquitees by *Bolton*, that must be the focus of our equal protection analysis. These differences are substantial.

Civil commitees have "commitment hearings" at which the government bears the burden of proving "mental

illness" and likelihood of injury to "himself or other persons" beyond a reasonable doubt. D.C. Code 1973, § 21-545(b); *In re Ballay*, 157 U.S.App.D.C. 59, 482 F.2d 648 (1973). In contrast, at a § 301(d)(2) "release hearing," the acquitee must carry the burden of demonstrating by a "preponderance of the evidence" that he "has recovered his sanity and will not in the reasonable future be dangerous to himself or others." D.C. Code 1973, §§ 24-301(d)(2), -301(e). The civil commitment process affords a jury, § 21-545; the acquitee "release hearing" process does not. *See* § 24-301. Release of a civil commitee does not require court supervision, § 21-546, whereas the court retains the last word for acquitees, § 24-301(e). The civil scheme furnishes regular six-month review initiated by the hospital, § 21-548, while the scheme for acquitees mandates review only upon a motion for relief, § 24-301(k), or petition for habeas corpus, § 24-301(g), initiated by the patient (while permitting review initiated by the hospital, § 24-301(e)).

Appellant maintains that even if the rationale for different commitment procedures is valid,[2] it must expire at a time no later than the end of the maximum prison term which could have resulted from criminal conviction.

[2] Although the issue has not been resolved, there has been much discussion concerning the propriety of the 1970 insanity commitment amendments and their vulnerability of a new *Bolton*-type challenge. *See Bethea v. United States*, D.C.App., 365 A.2d 64, 92 (1976), *cert. denied*, 433 U.S. 911 (1977); *United States v. Jackson*, *supra*; *United States v. Ecker*, 177 U.S.App.D.C. 31, 40-41, 543 F.2d 178, 187-88 (1976), *cert. denied*, 429 U.S. 1063 (1977); *United States v. Wright*, 167 U.S.App.D.C. 309, 311 n.9, 511 F.2d 1311, 1313 n.9 (1976); *Johnson v. Robinson*, 166 U.S.App.D.C. 62, 66, 509 F.2d 395, 399 (1977); *United States v. Brown*, 155 U.S.App.D.C. 402, 491 n.3, 478 F.2d 606, 608 n.3 (1973); *Dixon v. Jacobs*, 138 U.S.App.D.C. 319, 332-34, 427 F.2d 589, 602-04 (1970) (Leventhal, J., concurring and dissenting).

His claim, in effect, is that the running of the potential prison term activates *Baxstrom* and *Bolton* principles which entitle him, at that time, to additional safeguards. We therefore turn to the merits of appellant's claim.

III.

The United States Court of Appeals for the District of Columbia Circuit has given a measure of judicial endorsement to appellant's theory in *Waite v. Jacobs*, *supra*. In *Waite*, a pre-*Bolton* acquitee who could not reap *Bolton's* prospective benefits, *Bolton*, *supra* at 12-13, 395 F.2d at 653-54, made essentially the same claim that appellant makes here. The circuit court found merit in this equal protection claim. The court observed that

> after the expiration of the period for which an acquittee might have been incarcerated had he been convicted, it may be irrational, within the meaning of equal protection doctrine, to distinguish between an acquittee and a commitee. Acquitees who have been confined for that period, therefore, may be entitled to treatment no different from that afforded commitees. [*Waite v. Jacobs*, *supra* at 284, 475 F.2d at 395.]

The court then stated the issue to be "whether appellant, in seeking release from confinement, is on an equal footing with a commitee," *id.* at 288, 475 F.2d at 399, or, as a matter of law, is situated differently from a commitee. Adverting to the radical differences in initial treatment (pre-*Bolton* v. civil commitment), the court perceived that pre-*Bolton* acquitees and commitees were not on equal footing; it then opined that equal protection might well be transgressed in Waite's case, for "just as it is unconstitutional to place a burden on only one of two similarly situated persons [the traditionally accepted meaning of equal protection], *so also may it be irrational*

to place similar burdens on persons situated differently." *Id.* (emphasis added). The court concluded, "it would seem that [appellant] ha[d] a right to a hearing, with all the procedural safeguards available in civil commitment proceedings." *Id.* at 289, 475 F.2d at 400. Because, however, there was a possibility that Waite's commitment actually was attributable to a civil commitment which had preceded the criminal action, and because the court's novel equal protection analysis had not been briefed or argued, the court did not order specific relief; instead, it remanded the case to the district court for further proceedings.

It is this novel, call it "equalization," theory of equal protection which appellant invokes here—a theory that equal treatment of the two groups, commitees and acquitees, eventually requires remedial, *i.e.*, compensating, procedures for acquitees because their initial commitments were more perfunctory. For several reasons, however, we have concluded that the *Waite* analysis is inapplicable to this case.[4]

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[4] At least four subsequent circuit court opinions have mentioned *Waite* approvingly. Only one, however, definitely approved the "equalization" approach to an equal protection challenge, *see Johnson v. Robinson, supra*, and the expression of approval in *Johnson* is dicta. (The court, observing that appellant wished the "constitutional suggestion" of *Waite* transformed into a holding, required appellant first to present his *Waite*-based argument to the local District of Columbia courts.) In *United States v. Ecker, supra; United States v. Brown, supra;* and *Dixon v. Jacobs, supra* (Leventhal, J., concurring and dissenting), the court reaffirmed *Waite's* "equal footing" conclusion; *i.e.*, that at the end of the maximum period for which acquitees could have been sentenced, no differentiation is acceptable between them and committees. It is not clear, however, that those opinions adopted the "equalization" analysis mandating additional, remedial procedures for acquitees at that point.

In the first place, Waite's situation is factually distinguishable from that of appellant Jones. Waite, a pre-*Bolton* acquitee suffered from the "no judicial review" (save habeas corpus) system condemned in *Bolton*. He had been automatically, indefinitely committed as presently ill and dangerous because he successfully raised a mere reasonable doubt about his legal sanity at the time of committing the offense.[5] Because of the unfortunate circumstances of his pre-*Bolton* status, Waite had remained confined in a mental hospital without ever receiving constitutional, procedural protections.[6]

Jones, on the other hand, is a post-*Bolton*, post-1970 acquitee. Unlike Waite, Jones carried the burden at his criminal trial of proving by a "preponderance of the evidence" that he was insane at the time he committed the offense. D.C. Code 1973, § 24-301(j). In addition, while receiving less than a *Bolton* (civil commitment) hearing after the criminal trial, Jones did receive substantially more protection than Waite by virtue of the § 24-301(d)(2) "release hearing." Thus, upon Jones' indefinite commitment, he was in a factually different posture from Waite vis-a-vis civil commitees. *See Johnson v. Robinson*, 166 U.S.App.D.C. 62, 66, 509 F.2d 395, 399 (1974).

Second, at the time of indefinite commitment, Jones also was in a legally different posture from Waite vis-a-

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[5] For discussions of the irrationality of basing a finding of present mental illness on a previous doubt about sanity, *see United States v. Brown*, *supra* at 409, 478 F.2d at 613 (Wright, J., dissenting); *Bolton*, *supra* at 6, 395 F.2d at 647.

[6] That the inequity of the situation may have influenced the court's reasoning is intimated by the *Waite* opinion, *Waite v. Jacobs*, *supra* at 284 n.7, 475 F.2d at 395 n.7, and by *Johnson v. Robinson*, *supra* at 63, 509 F.2d at 396, both of which referred to the "anomaly" created by *Bolton's* prospective application.

vis civil committees. Because Waite was a pre-*Baxstrom*, pre-*Bolton* acquitee, his initial commitment was constitutionally invalid; the court accordingly found him, as a matter of law, "situated differently" from a civil committee. *Waite*, *supra*, at 288-89, 475 F.2d 399-400. Jones, to the contrary, proceeds from the premise that the § 24-301(d) safeguards in his release hearing were constitutionally sufficient to fill the historical gap in protection (upon initial commitment) between acquitees and committees--the gap which persuaded the circuit court to assist Waite, and Bolton before him, on equal protection grounds.

The present case, therefore, is significantly different from *Waite*, which was a decision explicitly limited to pre-*Bolton* acquitees. *Waite*, *supra* at 285 n.8, 475 F.2d at 396 n.8. We are presented here with a much narrower question: whether, as a matter of equal protection, the differences in *valid* initial commitment procedures for acquitees and committees are nevertheless significant enough to require a remedy for the acquitee at the expiration of the maximum period for which he could have been sentenced—a remedy granting him either his outright release or a second (this time purely civil) commitment proceeding. The constitutional rationale for such a remedy, assuming for argument's sake the validity of *Waite's* equalization theory for equal protection, would be that the post-1970 acquitee, like the pre-*Bolton* acquitee, has been "situated differently" from a committee (while treated the same), despite the presumed validity of the respective initial commitment procedures. We therefore must examine whether, as a matter of law, situational differences can be said to exist upon confinement.

An acquitee's § 24-301 release hearing and a committee's § 21-545(b) civil commitment hearing both pur-

port to determine whether one is mentally ill and dangerous.[7] Thus, these respective procedures can result in differently situated confinees only if the acquitee's hearing results in a perversion of that determination when compared with a commitee's hearing.

One such perversion would be a determination derived, in part, by reference to the criminal offense.[8] Because appellant's confinement after a § 24-301 release is not challenged, however, appellant must be presumed to agree that this confinement is not based, even in part, on punitive considerations; otherwise, it would be unconstitutional under *Baxstrom*, *supra*; *see Humphrey v. Cady*, 405 U.S. 504, 510-11 (1972); *Waite*, *supra* at 285-86, 475 F.2d 396-97; note 8 *supra*. Therefore, absent any explanation as to why the § 24-301(d) release hearing results in lesser quality findings of illness and dangerousness than a § 21-545(b) civil commitment hearing, we must conclude that the findings are legally the same.

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[7] The determination for an acquitee is whether he "has recovered his sanity [and] . . . will not in the reasonable future be dangerous to himself or others." D.C. Code 1973, § 24-301(e). The determination for a potential commitee is whether "the person is mentally ill and, because of that illness, is likely to injure himself or other persons if allowed to remain at liberty." D.C. Code 1973, § 21-545(b).

[8] More particularly, one might argue that an acquitee's commitment is actually based on more than a mentally ill and dangerous finding—that the acquitee's burden to prove his sanity, without right to jury trial, reflects a punitive gloss derived from his previous criminal behavior. It would follow that an acquitee is situated differently from a commitee because this extra, punitive basis for commitment has permitted an abbreviated, more burdensome release hearing, resulting, arguably, in a less valid finding of mental illness and dangerousness than the civil commitment process would yield.

It is true, of course, that appellant's criminal offense is the reason why his confinement took place by way of § 24-301(d), not § 21-545(b). Thus, in order to be as clear as possible why it makes no legal difference in this case whether appellant was initially confined under the "insane criminal" or the civil commitment procedure, we should explain (without deciding) the argument why § 24-301(d) is not punitive—why, under § 24-301(d) the criminal offense does not provide a basis for confinement. Once it is clear that § 24-301(d) and § 21-545(b) arguably establish equally valid procedures for determining mental illness and dangerousness, it should then be clear why appellant's request here—release or civil commitment at the end of the maximum potential prison term—is inconsistent with the presumed validity of his confinement.

Arguably, the acknowledged differences between the two procedures—most notably the right to jury trial and allocation of the burden of proof to the government under the civil commitment scheme—can be justified by reference to situational differences between the two groups immediately prior to the respective hearings. The civil commitment question, as to any potential committee, is of first impression, whereas the "release hearing" procedure for an acquittee presumably can be somewhat abbreviated because of the predictive value of the initial determinations of insanity and dangerousness at the criminal trial. (That predictive value rests on the defendant's own prior proof of his insanity by a preponderance of the evidence—by a jury trial if he requested it.) Whereas the § 24-545(b) hearing, therefore, represents a de novo process, the § 24-301(d) hearing is an updating process to determine how present mental status compares with earlier findings which had been urged by the defendant himself. *See* note 7 *supra*. In either case, the

only concern is a determination as to sanity and dangerousness, with a view to rehabilitation. Given these situational differences between acquitees and potential commitees immediately prior to the initial commitment determination, the difference in hearing procedures is arguably justified; there is no constitutional prohibition against rational differences in the treatment of differently situated persons.

There is accordingly, no room for appellant's contention that his hospital confinement must cease (subject to civil commitment) at the end of the maximum term for which he could have been confined to prison. Although the confinement procedures differ for acquitees and commitees, the status of each group after confinement is the same: each has been found mentally ill and dangerous, and each, as a result, has been confined for the protection of self or society, as well as for treatment, not punishment.* The termination of the maximum sentence period is thus irrelevant to the status of acquitees; that termination does not alter the similarity of situation between acquitees (after confinement) and commitees.

In summary, the length of a hypothetical potential prison term has no relationship to the rehabilitative goal of hospital confinement. If, as the presumed validity of appellant's initial commitment implies, the differences in hearing procedures for acquitees and commitees are justified because, prior to hearing, they are differently situated, there is no rational, let alone constitutional, basis for arguing that an abrupt change of procedure is required simply because somewhere along the line the hypothetical maximum sentence has ended. The proper

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* Appellant has not argued that his physical or other treatment at St. Elizabeths, as an acquitee, differs in a legally significant way from that accorded to commitees.

APPENDIX B

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 11918

MICHAEL A. JONES, APPELLANT,

v.

UNITED STATES, APPELLEE.

On Petition for Rehearing

(Hon. Eugene N. Hamilton, Hearing Judge)

(Argued April 16, 1979 Decided February 4, 1980)

Silas J. Wasserstrom, Public Defender Service, appointed by the court, for appellant.

Cheryl M. Long, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney at the time the brief was filed, *John A. Terry*, *Oscar Altshuler*, and *Richard W. Goldman*, Assistant United States Attorneys, were on the brief, for appellee.

Before KELLY, MACK, and FERREN, *Associate Judges*.

Opinion for the court by *Associate Judge* FERREN.

Concurring opinion by *Associate Judge* MACK at p. 15.

Dissenting opinion by *Associate Judge* KELLY at p. 15.

FERREN, *Associate Judge*: Michael A. Jones was found not guilty of petit larceny by reason of insanity. Thereafter, the court held a "release hearing" pursuant to D.C. Code 1973, § 24-301(d), and committed Jones indefinitely to St. Elizabeths Hospital. In our first opinion, reported at [illegible] A.2d 183 (1978), we rejected Jones' contention that he is entitled, as a matter of equal protection, to release from St. Elizabeths upon expiration of the maximum period for which he could have been imprisoned unless the government carries the burden of proving at a civil commitment hearing that he is still mentally ill and dangerous to self or others. *See* D.C. Code 1973, § 21-545(b). More specifically, assuming the validity of Jones' confinement after the "release hearing" (which is uncontested here), we held there is

> no constitutional requirement that appellant be released or civilly committed at the end of the maximum imprisonment period, for that period bears no relationship to the unchallenged basis for appellant's hospital confinement: that he is mentally ill, is dangerous to self or others, and should receive treatment until he is well enough for release. [*Jones*, *supra* at 184.]

After reconsideration, we vacate our first order. We conclude that an acquitee may not be confined for treatment pursuant to § 24-301(d) beyond the maximum period for which he or she could have been imprisoned for the underlying criminal charge. An acquitee is entitled to release at the end of that period unless the government obtains a civil commitment. Accordingly, because that maximum period of one year has expired here, appellant Jones shall be released unless civilly committed forthwith.

[171]

I.

Central to the analysis in our first opinion was the following legal premise, based on *Baxstrom v. Herold*, 383 U.S. 107 (1966): if commitment to St. Elizabeths after a § 24-301(d)(2) "release hearing" is to survive an equal protection challenge, it may not be punitive in any respect.[1] In other words, the commitment procedure must be wholly rehabilitative—wholly a process for finding someone mentally ill and dangerous to self or others. *Jones, supra* at 188 & n.7.[2] Consequently, we concluded that appellant's failure to challenge the § 24-301(d) "release hearing" procedure meant that

> appellant must be presumed to agree that this confinement is not based, *even in part*, on punitive considerations; otherwise, it would be unconstitutional under *Baxstrom, supra; see Humphrey v. Cady*, 405 U.S. 504, 510-11 . . . (1972);

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[1] In *Baxstrom*, the Court held that a prisoner who was civilly committed as insane at the end of his prison term was denied equal protection by a statutory procedure which deprived him of a jury review accorded to other civil commitees. Since *Baxstrom*, the Court has upheld other equal protection challenges by individuals who enter mental health facilities through the criminal process. *See Jackson v. Indiana*, 406 U.S. 715 (1972) (equal protection violated by state procedures which provide more lenient commitment standards and more stringent release standards for those criminal defendants found incompetent to stand trial than for those civilly committed); *Humphrey v. Cady*, 405 U.S. 504 (1972) (remand for evidentiary hearing on claim that protections afforded those civilly committed were not extended to those committed under sex crimes act).

[2] Put still another way, if § 24-301(d) is constitutional, it must merely be another equally valid route to the same finding derived from the civil commitment process under D.C. Code 1973, § 21-545(b). *See Jones, supra* at 188 n.7.

> *Waite* [*v. Jacobs*, 154 U.S.App.D.C. 281, 285-86, 475 F.2d 392, 396-97 (1973)] . . . . Therefore, absent any explanation as to why the § 24-301(d) release hearing results in lesser quality findings of illness and dangerousness than a § 21-545(b) civil commitment hearing, we must conclude that the findings are legally the same. [*Jones*, *supra* at 189 (emphasis added).][3]

In his petition for rehearing, appellant questions our legal premise. He argues, in effect, that the § 24-301(d) "release hearing" procedure is to some extent punitive, as evidenced by the less-protective procedures afforded acquitees than civil commitees; that *Baxstrom*, *supra*, does not necessarily make that procedure unconstitutional as a means for initially confining acquitees; but that the price of constitutionality is release or civil commitment at the end of the hypothetical maximum prison term, since that is the longest an acquitee can be confined for punitive reasons without a denial of equal protection of the laws.

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[3] We concluded, accordingly, that there was "no room for appellant's contention that his hospital confinement must cease (subject to civil commitment) at the end of the maximum term for which he could have been confined to prison. Although the confinement procedures differ for acquitees and commitees, the status of each group after confinement is the same: each has been found mentally ill and dangerous, and each, as a result, has been confined for the protection of self or society, as well as for treatment, not punishment. The termination of the maximum sentence period is thus irrelevant to the status of acquitees; that termination does not alter the similarity of situation between acquitees (after confinement) and commitees." [*Jones*, *supra* at 189 (footnote omitted).]

Appellant derives his argument primarily from *United States v. Brown*, 155 U.S.App.D.C. 402, 407-08, 478 F.2d 606, 611-12 (1973), in which the United States Court of Appeals for the District of Columbia Circuit acknowledged—and upheld—a partially punitive underpinning to the former § 24-301(d) procedure. Specifically, the *Brown* court upheld an instruction, based on *Bolton v. Harris*, 130 U.S.App.D.C. 1, 395 F.2d 642 (1968), that the government had the burden at a "release hearing" of proving respondent mentally ill and dangerous by a preponderance of the evidence, and further held that this instruction would not violate equal protection even if the government, in a civil commitment proceeding, had the burden of proof beyond a reasonable doubt.[4] The *Brown* majority justified this lesser burden of proof in the criminal commitment procedure in the following way:

> The difference between the classes [acquitees and commitees] for purposes of burden of proof, is in the extent of possibility and consequence of error. If there is error in a determination of mental illness that results in a civil commitment, a person may be deprived of lib-

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[4] The *Brown* court, therefore, was dealing with the earlier § 24-301(d) procedure. In the present case we deal with the post-1970 scheme under which an acquitee has the burden of proving, by a preponderance of the evidence, that he has recovered his sanity. *See Jones, supra* at 185.

The recent case of *In re Nelson*, D.C.App., —— A.2d —— (No. 13768, Dec. 4, 1979), indicated that the proper burden of proof in civil commitments should be "clear and convincing evidence" rather than proof "beyond a reasonable doubt" in light of *Addington v. Texas*, 99 S.Ct. 1804 (1979). The level of the government's burden in civil commitment proceedings does not affect our analysis here, however, since the burden remains on the government.

> erty although he never posed any harm to society. If there is a similar error in confinement of an insanity-acquitted individual, there is not only the fact of harm already done, but the substantial prospect that the same error, ascribing the quality of mental disease to a less extreme deviance, resulted in a legal exculpation where there should have been legal responsibility for the antisocial action.
>
> The matter now being discussed is suffused with the broad consideration that modern standards of the insanity defense, not restricted to those who do not know right from wrong, call for the acquittal of persons who "may have meaningful elements of responsibility." And over and above the difficulty of situations where the issue of mental responsibility is doubtful, we cannot wholly ignore the danger of calculated abuse of the insanity defense, referred to in *Lynch v. Overholser* [, 369 U.S. 705 (1962)]. [*Brown*, *supra* at 407, 478 F.2d at 611 (footnote omitted).]

Appellant points out that *Brown* went on to suggest, on the basis of *Baxstrom*, *supra*, that there is a *quid pro quo* for this weaker insanity commitment standard, namely, that an acquitee is constitutionally entitled as of the end of the maximum prison term to release or, at worst, to civil commitment:

> The clear implications of the foregoing analysis, and *Baxstrom*, require, however, that when the individual has been in detention for a considerable period of time, his continued detention *vel non* should be governed by the same standard of burden of proof as applies to civil com-

> mitments. The extent of that period calls for sound discretion, would take into account *e.g.*, the nature of the crime (violent or not), nature of treatment given and response of the person, would generally not exceed five years, and should, of course, never exceed the maximum sentence for the offense, less mandatory release time. [*Brown, supra* at 408, 478 F.2d at 612 (footnote omitted).]

In summary, appellant argues that he had been led down the road by the United States Court of Appeals in *Brown, supra*, to a point beyond which he thought he would be taken seriously in a constitutional challenge to § 24-301(d).[5] That court had told him, in essence, not to bother challenging the release-hearing procedure but instead to assume that a partially-punitive commitment is valid under *Baxstrom, supra*. Thus, he asserted the right to release or civil commitment as of the end of the maximum prison term—at the point where society's right to any punitive gloss on confinement ends. Accordingly, he says, our first opinion in this case viewed his failure to attack § 24-301(d) incorrectly—and unfairly—by concluding that it could only have one meaning: tacit acceptance of a wholly rehabilitative underpinning to the commitment procedure, which justifies confinement beyond the maximum prison sentence.[6] We turn to this argument.

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[5] Appellant presumably would acknowledge, however, that *Brown, supra*, as a post-reorganization decision, is not binding on the court. *See M.A.P. v. Ryan*, D.C.App., 285 A.2d 310 (1971).

[6] Our assumption that appellant's acceptance of § 24-301(d) necessarily implied his agreement that the process was wholly rehabilitative was based on our view that *Baxstrom, supra*, and *Humphrey v. Cady*, 405 U.S. 504 (1972), would consti-

II.

In reconsidering appellant's assumption, solely for the sake of argument, that § 24-301(d) is valid, we must put the question in perspective by outlining the differences between the civil and criminal commitment schemes. Appellant, as an acquitee, carried the burden of proving his insanity at the time of the charged offense by a preponderance of the evidence. He had the right to a jury if he had wanted one. Upon a verdict of not guilty by reason of insanity, the District, like many states, permits continued confinement for a prescribed, relatively brief period of observation.[7] The courts have justified

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tutionally preclude confining acquitees under procedures less protective than those accorded to commitees if such confinement were "based, even in part, on punitive considerations." *Jones*, *supra* at 189. Thus, if § 24-301(d) were valid as a wholly rehabilitative procedure and confinement, any difference from a civil commitment determination under § 21-545(b) could only be justified on evidentiary grounds; *i.e.*, in contrast with a civil commitment, "the 'release hearing' procedure for an acquitee presumably can be somewhat abbreviated because of the predictive value of the initial determinations of insanity and dangerousness at the criminal trial." *Jones*, *supra* at 189. Because there is authority for such analysis, *see*, *e.g.*, *In re Franklin*, 7 Cal.3d 126, 496 P.2d 465, 101 Cal. Rptr. 553 (1972) (en banc), we interpreted appellant's acceptance of his confinement under § 24-310(d) as acceptance of a purely evidentiary justification for the differences between the criminal and civil commitment procedures —a justification presuming equally valid findings of mental illness and dangerousness under §§ 21-545(b) and 24-301(d). *See Jones*, *supra* at 188 n.7.

[7] In the District of Columbia, automatic confinement cannot exceed 50 days, D.C. Code 1973, § 24-301(d). In *Franklin*, *supra* at 143, 496 P.2d at 475, 101 Cal. Rptr. at 563, the court approved [illegible]y period in California. The Model Penal Code allows six months, ALI Model Penal Code § 4.08 (Proposed Official Draft 1962).

this confinement, which is not required in cases of civil commitment,[8] on at least two grounds. Some have stressed the continuing presumption of insanity once established by the acquitee—an evidentiary emphasis. *See, e.g., In re Franklin*, 7 Cal. 3d 126, 136, 496 P.2d 465, 470, 101 Cal. Rptr. 553, 558 (1972) (en banc). Others have emphasized the dangerousness inherent in the offense excused by insanity, and the need for protection of the public while psychiatric observation takes place—arguably a punitive emphasis. *See, e.g., Chase v. Kearns*, 278 A.2d 132, 135 (Me. 1971) (en banc).

These same courts, moreover, commonly justify statutory confinement beyond the observation period if, after a review proceeding (akin to a § 24-301(d)(2) "release hearing"), the acquitee fails to sustain the burden of persuading the court that he or she has recovered. Their reasoning reflects an extension of the justification for the observation period. First, apropos of the evidentiary emphasis, the courts note that the acquitee has initiated and once sustained the burden of proving insanity, whereas the prospective civil commitee has not yet so conclusively manifested mental illness and dangerousness. Thus, the presumption of an acquitee's insanity continues. Second, these courts conclude that, because the trier has found beyond a reasonable doubt that the acquitee has committed the charged offense (although he or she is not rationally or morally responsible for that act), it is

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[8] For example, in the District of Columbia, persons may be detained at a public or private hospital for up to 48 hours for emergency observation and diagnosis upon application by an appropriate authority and certification by a psychiatrist. D.C. Code 1973, §§ 21-521, -522. A detained individual must be released after 48 hours, however, unless a court order is obtained. D.C. Code 1973, § 21-523. *Williams v. Meredith*, D.C. App., 407 A.2d 569 (1979).

not unreasonable for society, as a matter of self-protection, to demand that the acquitee receive treatment for mental illness. Such treatment can be justified for at least as long as the maximum possible prison term he or she would have received, unless the acquitee can carry the burden of demonstrating an earlier recovery. The courts accordingly perceive a situational difference between acquitees and commitees constitutionally sufficient to justify keeping the burden of proof on the former but not the latter. *See Franklin, supra* at 138, 496 P.2d at 476, 101 Cal. Rptr. at 560 (acquitees are an "exceptional class"); *Chase, supra* at 138 (same).

After reviewing numerous cases, we conclude that the courts typically mix evidentiary and punitive rationales in justifying less comprehensive review of acquitees at "release hearings" than is afforded civil commitees at such proceedings.[9] In view of this precedent, we must agree that appellant's willingness to assume the constitutional validity of § 24-301(d)(2) cannot, in fairness, be said to imply a concession that all aspects of that proce-

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[9] *See, e.g., Mills v. State*, 256 A.2d 752, 755-57 (Del. 1969) (upholding release hearing procedure using regular superior court jury with burden of proof on acquitee; both rationales); *State v. Allen*, 166 N.W.2d 752, 758 (Iowa 1969) (acquitees may be required to prove regained sanity beyond a reasonable doubt; evidentiary and punitive rationales); *State v. Shackford*, 262 A.2d 359, 366 (Me. 1970) (same; punitive rationale); *Daniels v. Superintendent*, 34 Md.App. 173, 180, 366 A.2d 1061, 1069 (Ct. Spec. App. 1976) (acquitees can be required to carry burden of proof; evidentiary rationale); *State v. Taylor*, 158 Mont. 323, 331, 491 P.2d 877, 881 (1971), *cert. denied*, 406 U.S. 978 (1972) (same; punitive rationale); *In re Lee*, 46 App. Div.2d 999, 1000, 362 N.Y.S.2d 635, 636-37 (1974) (district attorney may participate in acquitee's release hearing; punitive rationale).

dure are justified solely on evidentiary (and thus non-punitive) grounds.[10]

III.

Now that we are confronted by the possibility that the criminal commitment procedure can, to some extent, be punitive yet constitutional, we must reconsider the nature of a § 24-301(d) confinement. There are three possibilities, not two as we originally perceived: (1) it is wholly rehabilitative (*i.e.*, not at all punitive), in which case an acquitee can be committed indefinitely, without regard to a hypothetical maximum prison sentence, subject only to the periodic review afforded civil commitees, *see Jones*, *supra* at 190; or, at the other extreme, (2) it is inherently punitive, in which case the release hearing procedure itself is unconstitutional, *see Baxstrom*, *supra*; *Humphrey v. Cady*, 405 U.S. 504, 510-11 (1972); *Brown*, *supra* at 409-10, 478 F.2d at 613-14 (Wright, J., dissenting); *Waite*, *supra* at 285-86, 475 F.2d at 396-97;[11] or, as appellant urges, (3) it is partially (but perhaps justifiably) punitive at the outset, in which case an acquitee, although lawfully confined for awhile, arguably must be released (or civilly committed) no later than the end of the maximum prison term for which the ac-

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[10] Accordingly, we retract the statement in our first opinion that "appellant must be presumed to agree that this confinement is not based, even in part, on punitive considerations; otherwise it would be unconstitutional under *Baxstrom*, *supra*; *see Humphrey v. Cady* . . . ." *Jones*, *supra* at 189.

[11] In this case, an acquitee would be entitled to release or to civil commitment proceedings promptly after the insanity acquittal. *See Bolton*, *supra*.

quitee could have been sentenced.[12] *See Brown, supra* at 408, 478 F.2d at 612.

Assuming the constitutional validity of § 24-301(d), we must choose between the first and third alternatives to decide the issue raised by appellant.[13] If we conclude—as previously assumed—that § 24-301(d) is wholly rehabilitative, then our first opinion and order will stand. If, however, we conclude that § 24-301(d) in some respects is punitive, then appellant's argument may have merit.

Confronting the question that we dealt with only hypothetically in our first opinion, we reject the view that an acquitee's mental illness and dangerousness at the time of the offense are consistently such powerful evidence of illness and dangerousness later (*i.e.*, at the time of the "release hearing") that they raise a presumption of continuing insanity in every case. *See Brown, supra*

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[12] We understand appellant to base his argument on the hypothetical maximum prison term to which the acquitee himself could be sentenced, not simply on the maximum sentence for the particular crime involved, without regard to the acquitee's own criminal history. We do not, however, resolve that question here.

[13] Appellant declines to question the constitutionality of § 24-301(d) and we agree that this court should not issue an advisory opinion on that subject. On the other hand, appellant has said that assuming the validity of § 24-301(d), he should not be held—as in our first opinion—to assume that it in no respect is punitive, since there is respectable legal precedent for the view that release-hearing procedures can be constitutional while partially punitive. We agree. Therefore, if, after examining § 24-301(d), we conclude that it *is*, to some extent, punitive, we properly can refrain from evaluating its constitutionality and, instead, can make a narrower analysis determining whether such punitive procedures can be imposed for an indefinite period.

at 409-10, 478 F.2d at 613-14 (Wright, J., dissenting); *Bolton, supra* at 8, 395 F.2d at 649. Thus, contrary to the assumption underlying our first opinion, we conclude that the difference between criminal and civil commitment procedures [14] cannot be justified on purely evidentiary grounds. It follows, therefore, that if society legitimately can place a greater burden on the acquitee to avoid continued confinement than it places on a prospective civil commitee, that burden must be justified by the public's interest in greater protection than it would be likely to receive by subjecting acquitees to the civil commitment process. Furthermore, because § 24-301(d) is premised, in part, on an earlier criminal offense—a confinement which might not have occurred if the government had the burden of proof before a new jury—this release-hearing procedure is, to some extent, "punitive."

The public's interest in safety is, of course, limited by the acquitee's right to equal protection. Assuming the best case for the constitutionality of § 24-301(d), appellant argues that its partially punitive character at least dictates, as a matter of equal protection vis-a-vis civil commitees, that acquitees be released (or civilly committed) no later than the end of the maximum prison term they could have received if criminally convicted. We agree.

According to *Baxstrom, supra* at 111, "[e]qual protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made" (citation omitted). *Accord, Bolton, supra* at 10, 395 F.2d at 651. On the basis of the partially punitive rationale for the criminal commitment

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[14] *Compare* D.C. Code 1973, § 24-301(d) *with* § 21-545(b).

scheme set forth earlier, *see* text and cases at note 9 *supra*, the criminal commitment scheme might survive equal protection scrutiny under *Baxstrom*, *supra*, even though the procedure for confining civil commitees provides greater protection for the individual at the outset (the right to a jury and burden of proof on the government). We agree with appellant, however, that there is no basis for confining an acquitee under § 24-301(d) beyond the length of the hypothetical maximum prison term, since that term marks the end of society's claim on that individual for any kind of punishment. Any longer confinement must depend, constitutionally, on a *de novo* civil commitment. *See Humphrey*, *supra* at 510-11; *Baxstrom*, *supra* at 110-11; *Brown*, *supra* at 408, 478 F.2d at 612.[15]

IV.

Accordingly, we hold that because the maximum possible prison term for which appellant Michael Jones could have been incarcerated has expired, he is entitled to release from St. Elizabeths Hospital, subject to the government's right to seek civil commitment. The opinion and judgment heretofore filed are therefore vacated. The government shall have 30 days from the date of the mandate issued pursuant to today's order in this case to initiate civil commitment proceedings against appellant. Once those proceedings have been initiated, he shall be

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[15] It is important to stress that if the § 24-301(d) release hearing is valid, as assumed, despite a partially punitive underpinning, our holding permits confinement under § 24-301(d) to the end of the maximum applicable prison term, no matter how long that may be. We perceive no basis for the *Brown* court's view that the punitive justification for § 24-301(d) may expire short of the maximum sentence (and "would lly not exceed five years"). *Id.* at 408, 478 F.2d at 612.

confined, if at all, in accordance with Title 21 of the District of Columbia Code. In the event that appellant does not become the subject of civil commitment proceedings during this 30-day period, he shall be given his freedom.

So ordered.

MACK, *Associate Judge*, concurring: I concurred in our first opinion, 396 A.2d 183 (1978), because I did not construe that analysis as holding that the criminal commitment procedures of D.C. Code 1973, § 24-301 would pass muster as against a challenge on equal protection or procedural due process grounds, citing *Jackson v. Indiana*, 406 U.S. 715 (1972). I concur in the instant holding because the serious reservations that I held about the constitutionality of such procedures are erased by our choosing to mandate that an acquitee must be released from incarceration at the expiration of the maximum period of possible imprisonment for the criminal charge, subject to the government's right to seek civil commitment.

KELLY, *Associate Judge*, dissenting: I would adhere to our original decision to affirm the order on appeal (*Jones v. United States*, D.C.App., 396 A.2d 183 (1978)) and so dissent from this opinion on rehearing.

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APPENDIX C

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 11918

MICHAEL A. JONES, APPELLANT,

v.

UNITED STATES, APPELLEE.

On Petition for Rehearing En Banc

(Hon. Eugene N. Hamilton, Trial Judge)

(Argued En Banc Sept. 8, 1980 Decided May 29, 1981)

Silas J. Wasserstrom, Public Defender Service, for appellant.

Michael W. Farrell, Assistant United States Attorney, with whom *Charles F.C. Ruff*, United States Attorney, *John A. Terry* and *Oscar Altshuler*, Assistant United States Attorneys, were on the petition, for appellee.

Larry Martin Corcoran filed a brief as amicus curiae.

Before NEWMAN, *Chief Judge*, and KELLY, KERN, GALLAGHER,* NEBEKER, HARRIS, MACK, FERREN and PRYOR, *Associate Judges*.

Opinion for the court by *Associate Judge* KELLY.

* Judge Gallagher was an Associate Judge of the court at the time of argument. His status changed to Associate Judge, Retired, on February 27, 1981.

Dissenting opinion by *Associate Judge* FERREN, with whom *Chief Judge* NEWMAN and *Associate Judge* MACK join, at p. 25.

KELLY, *Associate Judge*: Appellant Michael A. Jones is a mental patient at St. Elizabeths Hospital where he has been committed since March 1976, pursuant to D.C. Code 1973, § 24-301(d).[1] In February 1977, he appealed

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[1] Subsection 24-301(d), which controls the commitment of persons found not guilty by reason of insanity (acquittees), reads:

> (d)(1) If any person tried upon an indictment or information for an offense raises the defense of insanity and is acquitted solely on the ground that he was insane at the time of its commission, he shall be committed to a hospital for the mentally ill until such time as he is eligible for release pursuant to this subsection or subsection (e).
>
> (2) A person confined pursuant to paragraph (1) shall have a hearing, unless waived, within 50 days of his confinement to determine whether he is entitled to release from custody. At the conclusion of the criminal action referred to in paragraph (1) of this subsection, the court shall provide such person with representation by counsel—
>
> > (A) in the case of a person who is eligible to have counsel appointed by the court, by continuing any appointment of counsel made to represent such person in the prior criminal action or by appointing new counsel; or
> >
> > (B) in the case of a person who is not eligible to have counsel appointed by the court, by assuring representation by retained counsel.
>
> If the hearing is not waived, the court shall cause notice of the hearing to be served upon the person, his counsel, and the prosecuting attorney and hold the hearing. Within ten days from the date the hearing was begun, the court shall determine the issues and make findings

from an order by Judge Eugene N. Hamilton denying his request for immediate release from St. Elizabeths or in the alternative for civil commitment in accordance with the procedures set forth in D.C. Code 1973, § 21-545(b),[2] basing his challenge to his continued confinement on the argument that detention beyond the maximum period for which he could have been imprisoned for the offense of which he was acquitted denies him equal protection of the laws.

Our first panel opinion, which relied on an express abstention from a challenge to his initial commitment, held

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of fact and conclusions of law with respect thereto. The person confined shall have the burden of proof. If the court finds by a preponderance of the evidence that the person confined is entitled to his release from custody, either conditional or unconditional, the court shall enter such order as may appear appropriate.

(3) An appeal may be taken from an order entered under paragraph (2) to the court having jurisdiction to review final judgments of the court entering the order.

[2] Subsection 21-545(b), concerning involuntary civil commitment, reads, in pertinent part:

If the court or jury finds that the person is mentally ill and, because of that illness, is likely to injure himself or other persons if allowed to remain at liberty, the court may order his hospitalization for an indeterminate period, or order any other alternative course of treatment which the court believes will be in the best interests of the person or of the public. The Commission, or a member thereof, shall be competent and compellable witnesses at a hearing or jury trial held pursuant to this chapter. The jury to be used in any case where a jury trial is demanded under this chapter shall be impaneled, upon order of the court, from the jurors in attendance upon other branches of the court, who shall perform the services in addition to and as part of their duties in the court.

that appellant had no right to the relief requested. *Jones v. United States*, D.C.App., 396 A.2d 183 (1978). Appellant petitioned for rehearing or rehearing en banc, objecting to the panel's decision as unfairly based on his abstention from a challenge to the initial commitment under D.C. Code 1973, § 24-301(d)(2). Rehearing was thereafter granted and a second opinion issued holding that appellant was entitled to immediate release unless the government civilly committed him pursuant to D.C. Code 1973, § 21-545(b) because the "release hearing procedure is to some extent 'punitive'" and it would be a denial of equal protection to confine appellant under criminal commitment procedures beyond his hypothetical maximum prison sentence. *Jones v. United States*, D.C.App., 411 A.2d 624 (1980). The government petitioned for rehearing en banc, disputing the determination that the District of Columbia commitment scheme for insane criminals is punitive. Its petition was granted and the case was reheard by the en banc court. Since our previous opinions were vacated, we consider anew appellant's equal protection claim and hold that he is not entitled to automatic release from St. Elizabeths upon the expiration of his hypothetical maximum prison sentence unless civil commitment proceedings are instituted by the government.

Appellant's commitment resulted from a September 1975, charge of attempted petit larceny. He was first admitted to St. Elizabeths because of a court-ordered competency examination.[3] On March 12, 1976, on stipulated facts as to the crime and as to insanity, appellant was acquitted by the court of the charge by reason of insanity.

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[3] *See* D.C. Code 1973, § 24-301(a). The psychologist's report stated that appellant was competent to stand trial, but that he had "signs and symptoms of a severe mental disorder, including auditory hallucinations" and that he should be hospitalized at St. Elizabeths for treatment.

On May 25, 1976, Judge James A. Washington held a "50-day release hearing" pursuant to D.C. Code 1973, § 24-301(d)(2)[4] and continued appellant's confinement at St. Elizabeths because of his failure to prove by a preponderance of the evidence that he was no longer mentally ill or dangerous to himself and others.[5] A further hearing was set for November 29, 1976. On that date, Judge Hamilton held a second hearing during which appellant raised the argument that his confinement under § 301(d) could not extend beyond his hypothetical maximum prison sentence and that he was therefore entitled to release. The court ordered the government to show cause why appellant should not be released or civilly committed under D.C. Code 1973, § 21-545(b). After a hearing in February of 1977, Judge Hamilton denied appellant's motion for immediate release or in the alternative, civil commitment, and continued his indefinite confinement at St. Elizabeths. A timely appeal from this order was filed on February 28, 1977.[6]

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[4] *See* note 1 *supra*.

[5] In an April 23, 1976 letter, the Superintendent of St. Elizabeths reported that Jones was suffering from schizophrenia, paranoid type, and was on medication. The letter also stated that "Mr. Jones is in need of further hospitalization, and by virtue of his mental illness, he would be a danger to himself and to others if released into the community at this time."

[6] A subsequent motion for unconditional release under § 301(k) was denied in March of 1977. Three months later, however, appellant was granted conditional release on terms recommended by St. Elizabeths' staff, allowing daytime and overnight visits into the community. He was also admitted into the civil division of the hospital, though as a result of disruptive behavior, he was retransferred to the forensic division.

Before analyzing appellant's equal protection claim, we deem it necessary to reject any suggestion that confinement pursuant to subsection 301(d) is punitive in nature. We recognize that appellant never explicitly made such an assertion, but that implication underlies his argument (and certainly our prior opinions) that the length of the prison sentence which an acquittee might have received determines when he is entitled to release or civil commitment under Title 24 of the D.C. Code. We conclude that there is no basis for finding § 301(d) punitive in any respect.

This court's decision in *Bethea v. United States*, D.C. App., 365 A.2d 64, 90 (1976), *cert. denied*, 433 U.S. 911 (1977), noted that "Congress struck a careful balance between the interests of the individual and those of the community," in the enactment of the District of Columbia commitment scheme for persons acquitted by reason of insanity. The purpose behind this careful balance was explained in *Hough v. United States*, 106 U.S.App.D.C. 192, 195, 271 F.2d 458, 461 (1959), when Judge Bazelon stated that

> [T]he basic policy underlying the statute . . . as we read the legislative history, is to provide treatment and cure for the individual in a manner which affords reasonable assurance for the public safety. . . .

More recent cases reiterate the dual purpose of § 301(d) as first, the treatment and recovery of the patient, and second, the protection of society and the patient. *Collins v. Cameron*, 126 U.S.App.D.C. 306, 308, 377 F.2d 945, 947 (1967); *Overholser v. O'Beirne*, 112 U.S.App.D.C. 267, 269, 302 F.2d 852, 854 (1961); *Ragsdale v. Overholser*, 108 U.S.App.D.C. 308, 312, 281 F.2d 943, 947 (1960). The 1970 amendments to § 301(d), enacted in

response to the decision in *Bolton v. Harris*, 130 U.S.App. D.C. 1, 395 F.2d 642 (1968),[7] have not altered its original purpose. *See United States v. Jackson*, 179 U.S.App. D.C. 375, 381, 553 F.2d 109, 115 (1976). Indeed, the *Bolton* decision inescapably leads to the conclusion of nonpunitiveness. This is because *Bolton's* requirement of a separate judicial hearing before indeterminate commitment was intended to undo the punitive aspects attending the formerly automatic connection between the determination of guilt and the commitment of a defendant who pleaded insanity.

The exclusively remedial and protective goals of the statute demonstrate that a punitive rationale has no part in the commitment of persons acquitted by reason of insanity. We agree that

> [i]n the light of [the legislative] purpose [of § 301], we must reject the District Court's suggestion that appellant is a "prisoner." Nothing in the history of the statute—and nothing in its language—indicates that an individual committed to a mental hospital after acquittal of a crime by reason of insanity is other than a patient. The individual is confined in the hospital for the purpose of treatment, not punishment; and the length of confinement is governed solely by considerations of his condition and the public safety. Any preoccupation by the District Court with the need of punishment for crime is out of place in dealing with an individual who has been

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[7] *Bolton* held that acquittees are entitled to a hearing "substantially similar" to the hearings afforded civil commitees before they are indeterminately confined. The implications of this holding are more fully discussed below.

acquitted of the crime charged. [*Hough v. United States*, *supra* at 196, 271 F.2d at 462.]

Society may not excuse a defendant's criminal behavior because of his insanity and at the same time punish him for invoking an insanity defense. This would nullify that defense, contrary to express legislative intent, *see* D.C. Code 1973, § 24-301(j) (establishing procedures for pleading insanity), and raise serious constitutional issues.

The regulatory nature of § 301(d) is also evidenced by the non-adversarial character of commitment decisions. All parties, including the government, the hospital * and the acquittee assist in presenting the facts relevant to a determination of the proper conditions and treatment for the insanity acquittee. *See United States v. Ecker*, 177 U.S.App.D.C. 31, 45, 543 F.2d 178, 192 (1976), *cert. denied*, 429 U.S. 1063 (1977); *Bolton v. Harris*, *supra* at 12 n.64, 395 F.2d at 563 n.64; *Lake v. Cameron*, 124 U.S.App.D.C. 264, 268, 364 F.2d 657, 661 (1966) (en banc).

Furthermore, plain reason compels rejection of appellant's reliance on his hypothetical maximum prison term as artificial and meaningless. Statutory maximum sentences have no relationship to the purposes of mental care and treatment. They are intended rather, to set the outer boundaries of lawful punishment for persons found criminally responsible for specified offenses. Not even convicted criminals are automatically sentenced to the maxi-

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* In *Dixon v. Jacobs*, 138 U.S.App.D.C. 319, 330, 427 F.2d 589, 600 (1970), the circuit court in reversing the dismissal of an insanity acquittee's habeas corpus petition, stated that "Saint Elizabeths bears a special responsibility for assuring that information regarding the patient's condition is fully presented to the District Court, and that the court understandingly ... considers the information presented."

mum applicable term of incarceration. Subsection 301 (d) commitments are neither expressly nor impliedly related to statutory maximum sentences. To the contrary, § 301(d) contemplates an indeterminate period of confinement and treatment, depending on when the patient has recovered his sanity or no longer poses a danger to himself or others.[9] As *Dixon v. Jacobs*, 138 U.S.App. D.C. 319, 325, 427 F.2d 589, 595 (1970) explains:

> Confinement of the mentally ill rests upon a basis substantially different from that which supports confinement of those convicted of crime. In the latter case, with rare exceptions, the continuing validity of confinement rests solely on the validity of the initial commitment. Confinement of the mentally ill, however, depends not only upon the validity of the initial commitment but also upon the continuing status of the patient. Specifically, under our statutes, he must be released from the hospital if he is no longer mentally ill; if, although he remains mentally ill, he is no longer "likely to injure himself or other persons"; or, should the patient so desire, if a course of outpatient treatment can be fashioned that will adequately protect the interests both of the patient and the public. [Footnotes omitted.]

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[9] Thus it would be more accurate to say, and certainly more analytically useful, that appellant is actually challenging the indeterminate length of his commitment at St. Elizabeths, rather than only his "continued" confinement there. Equal protection, if violated at all, would be just as well put into question at the inception of the commitment since it effectively means an indefinite period of confinement.

The notion that the duration of an acquittee's hospitalization can be established by statute or court order ignores the most basic precepts of medicine and psychiatry. Unfortunately, the present state of the art makes it generally impossible to predict either the time required to rehabilitate a mental patient, if at all possible, or at what point he will cease to be a danger to himself or others. Only ongoing medical and psychiatric evaluation offer a realistic hope of such prognosis.[10] Therefore, reference to either a hypothetical maximum prison sentence, or even to a judicially limited commitment term would completely refute the statutory purpose of § 301(d) and would frustrate any attempt at treating and rehabilitating mental patients who happen to have been acquitted of crimes by reason of insanity.

Our conclusion that § 301(d) is not punitive is supported by our recent decision in *United States v. Edwards*, D.C.App., —— A.2d —— (Nos. 80-294 & 80-401, May 8, 1981) (en banc), where the contention that incarceration inevitably constitutes punishment was rejected. Though commitment of acquittees is in no sense incarceration, the principle that the penal character of a statute depends on its underlying nature and whether it is reasonably supported by a legitimate state interest, applies

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[10] *See Addington v. Texas*, 441 U.S. 418, 430-31 (1979), and authorities cited therein, holding that the lack of certainty and the fallibility of psychiatric diagnosis make proof of insanity by clear and convincing evidence constitutionally sufficient. *Addington* also recognized that "[i]n a civil commitment state power is not exercised in a punitive sense." *Id.* at 428. While Chief Justice Burger's opinion did not deal with commitment of persons found not guilty by reason of insanity, a § 301(d) commitment is actually a civil, not a criminal proceeding and *Addington's* reasoning should apply with equal force to commitment of acquittees.

equally to the analysis of commitment statutes.[11] There is no evidence that the District of Columbia statutory scheme for commitment of insane criminals is anything but a regulatory, prophylactic statute, based on a legitimate governmental interest in protecting society and rehabilitating mental patients. Nor is § 301(d) rendered penal by the fact that it is predicated on the commission of a crime. Evidence of crime is only one of the elements triggering § 301(d) commitment, the other element being

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[11] *See Bell v. Wolfish*, 441 U.S. 520, 537-38 (1979). Factors relevant to the determination of whether a statute is punitive are:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions." [*Id.* at 537-38 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).]

The *Bell* case also noted that

> A court must decide whether the disability is imposed for the *purpose* of punishment or whether it is but an incident of some other legitimate government *purpose* . . . . Absent a showing of an expressed *intent* to punish on the part of detention facility officials, that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." [*Id.* at 538 (quoting *Kennedy v. Mendoza-Martinez*, *supra* at 168-69, and citing *Flemming v. Nestor*, 363 U.S. 603, 613-17 (1960)) (emphasis added).]

proof of insanity by a preponderance of the evidence. Since the crime is relevant only insofar as it indicates dangerousness, not evil or criminal responsibility, the presumption of continuing dangerousness, which is rebuttable by the acquittee, is both reasonable and valid.

Because we have no evidence in the record that the conditions of appellant's confinement are punitive or that his particular commitment was based on punitive considerations, we must conclude that appellant's detention is grounded on the legitimate non-punitive interests of the District of Columbia.

Appellant challenges his confinement under § 301(d) as violative of equal protection of the laws. The due process guarantee of the Fifth Amendment of the United States Constitution, which is directly applicable to the District of Columbia, encompasses the right to equal protection. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Matter of C.W.M.*, D.C.App., 407 A.2d 617, 625 (1979).

In the absence of specific objections to conditions of confinement or claims of inadequate or discriminatory treatment,[12] the validity of appellant's equal protection claim depends on whether the differences between the present § 301(d) commitment scheme and the involuntary commitment scheme under § 545(b) of Title 24 are justifiable by reason of the situational differences between acquittees and commitees.

Our analysis begins with the Supreme Court case of *Baxstrom v. Herold*, 383 U.S. 107 (1966), which held that equal protection requires that a prisoner to be

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[12] The right to treatment for mental illness is recognized in *Tribby v. Cameron*, 126 U.S.App.D.C. 327, 379 F.2d 104 (1967), and *Rouse v. Cameron*, 125 U.S.App.D.C. 366, 373 F.2d 451 (1966).

transferred to a mental hospital be given the same procedural protections as those afforded other persons subject to involuntary civil commitment. Two years later, the United States Court of Appeals for the District of Columbia found that *Baxstrom*'s equal protection holding, as well as the due process guarantees of *Specht v. Patterson*, 386 U.S. 605 (1967),[13] require that "persons found not guilty by reason of insanity . . . be given a judicial hearing with procedures substantially similar to those in civil commitment proceedings." *Bolton v. Harris*, *supra* at 10, 395 F.2d at 651 (footnote omitted). *Bolton* was expressly premised on the weakness of the proof of a defendant's insanity at the time of the offense; when *Bolton* was decided, the standard for acquittal was whether there was a reasonable doubt regarding past sanity. *Id.* at 8, 395 F.2d at 649. The 1970 amendments to § 301 have significantly narrowed this evidentiary gap by requiring that the defendant affirmatively prove his exculpating insanity to the jury by a preponderance of the evidence at the trial for his criminal offense. D.C. Code 1973, § 24-301(j).[14] The judicial hearing required by *Bolton* was codified in § 301(d)'s 50-day release hearing provision, notwithstanding the changed nature of the insanity defense.

The equal protection test suggested by these cases is that the procedures and standards of different commit-

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[13] *Specht* held that sentencing pursuant to Colorado's Sex Offenders Act was criminal punishment and violated due process because it made a conviction for a sex offense the basis of indeterminate sentencing without affording the defendant a hearing on the issue of his mental illness, dangerousness or recidivism.

[14] Subsection 301(j)'s shift in the burden of proof was upheld against constitutional attack in *Bethea*, *supra*, and *United States v. Greene*, 160 U.S.App.D.C. 21, 489 F.2d 1145 (1973), *cert. denied*, 419 U.S. 977 (1974).

ment schemes be relevant to the classification and that any differences not be substantial. We therefore agree with the statement in *United States v. Jackson*, *supra* at 386, 553 F.2d at 120, that § 301(d) "must be upheld if there is a rational basis for the scheme it creates." The court arrived at this conclusion by determining that neither *Jackson v. Indiana*, 406 U.S. 715 (1972) (indeterminate pretrial commitment procedures found to violate equal protection), nor *Baxstrom*, *supra*, held that strict scrutiny applies to procedures used for the criminal commitment of mentally ill persons.[15] In reviewing the petitioner's argument in *Baxstrom*, Chief Justice Warren stated that "[e]qual protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which classification is made." *Baxstrom*, *supra* at 111. *Bolton* also recognized that "a reasonable application [of the equal protection doctrine] permits Subsection (d) to treat persons acquitted by reason of insanity differently from civilly committed persons to the extent that there are relevant differences between those two groups." *Bolton*, *supra* at 10, 395 F.2d at 651. But substantial differences are prohibited under *Bolton*. *Id.* Thus, a reasonable distinction between the two statutory schemes would be one that is both relevant to the government's legitimate interests in the separate classification and not impermissibly substantial.

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[15] *See also State v. Krol*, 68 N.J. 236, ——, 344 A.2d 289, 298 (1975) (questioning the equal protection test applicable to differences in commitment schemes required by *Baxstrom*, *supra*, and *Jackson v. Indiana*, *supra*) and Novak, *Realigning the Standards of Review Under the Equal Protection Guarantees—Prohibited, Neutral and Permissive Classifications*, 62 GEO. L. REV. 1071, 1101-03 (1974) (suggesting that *Jackson v. Indiana*, *supra*, and *Humphrey v. Cady*, 405 U.S. 504 (1972), were based on a "demonstrable rational basis" test).

Before reviewing the differences between § 24-301(d) and § 21-545(b), it is important to note their similarities. First, the substantive standard of commitment is identical under both statutes. The twofold proof requirement of mental illness and dangerousness varies only in the manner in which it is established.[16] Second, both § 24-301(d)(2) and § 21-545(b) provide for mandatory judicial hearings, with notice and assistance of counsel (court-appointed if necessary). These common characteristics constitute the essential due process rights associated with involuntary commitment. *See Vitek v. Jones*, 445 U.S. 480 (1980) (recognizing a prisoner's due process rights to a hearing before transfer to a mental health facility);[17] *Specht v. Patterson*,

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[16] The two-prong test is explicitly stated in § 21-545(b); however, § 24-301(d) only refers to an acquittee's entitlement to release. But it is reasonable to assume that the same standard governs § 301(d) release hearings by reference to § 24-301(e), which states that entitlement to release, upon hospital certification, depends on a showing that the acquittee is no longer mentally ill or dangerous.

[17] Justice White approvingly listed the following procedures outlined by the Nebraska District Court as the minimum required before transfer of a prisoner to a mental hospital:

> A. Written notice to the prisoner that a transfer to a mental hospital is being considered;
>
> B. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given;
>
> C. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state, except upon a finding, not arbitrarily made, of good cause for not

supra.[18] Thus with respect to important constitutional protections the two statutes provide the same coverage.

As persuasively explained in our first panel opinion, the differences between the two procedures

> can be justified by reference to situational differences between the two groups immediately prior to the respective hearings. The civil commitment question, as to any potential committee, is of first impression, whereas the "release hearing" procedure for an acquitee presumably can be somewhat abbreviated because of the predictive value of the initial determinations of insanity and dangerousness at the criminal trial. (That predictive value rests on the defendant's own prior proof of his insanity by a perponderance of the evidence—by a jury trial if he re-

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permitting such presentation, confrontation, or cross-examination;

D. An independent decisionmaker;

E. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;

F. Availability of legal counsel, furnished by the state, if the inmate is financially unable to furnish his own; and

G. Effective and timely notice of all the foregoing rights." [*Vitek v. Jones*, *supra* at 494-95.]

[18] The *Specht* opinion held that

> Due process . . . requires that [the defendant] be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed. [*Id.* at 610.]

quested it.) Whereas the § 24-545(b) hearing, therefore, represents a de novo process, the § 24-301(d) hearing is an updating process to determine how present mental status compares with earlier findings which had been urged by the defendant himself. . . . In either case, the only concern is a determination as to sanity and dangerousness, with a view to rehabilitation. Given these situational differences between acquitees and potential commitees immediately prior to the initial commitment determination, the difference in hearing procedures is arguably justified; there is no constitutional prohibition against rational differences in the treatment of differently situated persons. [*Jones v. United States*, *supra*, 396 A.2d at 189.]

There appear to be three differences between § 24-301(d) and § 21-545(b) commitments: (1) the availability of jury trial, (2) the question of who carries the burden of proof, and (3) the amount of proof required to justify commitment.[19] We review these distinctions individually to ascertain whether they are permissibly relevant or impermissibly substantial under *Baxstrom* and *Bolton*.

While the jury trial right available to commitees is not similarly available to an acquittee in a 50-day release hearing, this difference is justified by the fact that the acquittee has had a right to a jury determination of

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[19] We do not compare the differences in post-commitment procedures since they are not covered in these subsections and appellant's claim is based on the alleged invalidity of his confinement under subsection 301(d).

his sanity at the time of the offense.[20] Thus the acquittee's mental illness is initially established by affirmative proof. Dangerousness is no less validly established by proof that the defendant committed the criminal act, a finding necessarily underlying any acquittal by reason of insanity. *See Bethea, supra* at 93-95; *Smothers v. United State* D.C.App., 403 A.2d 306, 310 (1979). In *United States v. Ecker, supra* at 48, 543 F.2d at 195, the court stated that "[s]ince 1958 this court has consistently accepted the proposition that the dangerousness demonstrated by the commission of a crime and acquittal by reason of insanity constitutes a rational basis for the disparity in release provisions governing acquittees and commitees." (Footnote omitted). *Ecker* also recognized that some disparities in commitment proceedings are similarly permissible, *id.* at 49-50, 543 F.2d at 196-97, and explained that "[s]ubsection (d) patients are treated differently from civil commitees because they are 'an exceptional class of people' who have 'already unhappily manifested the reality of anti-social conduct.'" *Id.* at 50, 543 F.2d at 197 (footnotes omitted).

The fact that appellant's mental illness and dangerousness are not jury determined, but derived from a prior jury finding, is not significant since the continuation of these attributes is a rational and permissible evidentiary presumption.[21] In *Waite v. Jacobs*, 154 U.S.App.D.C.

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[20] Appellant's waiver of the right to a jury at his criminal trial does not affect our argument.

[21] It is also noteworthy that the Criminal Jury Instruction for the District of Columbia, No. 5.11 (3d ed. 1978), to be given when a defense of insanity is pleaded, informs the jury that the consequence of an acquittal by reason of insanity will be automatic commitment of the defendant to St. Elizabeths, followed by a release hearing within 50 days. The jury is also instructed that at this hearing the defendant

281, 288-89, 475 F.2d 392, 399-400 (1973), the validity of this presumption was recognized:

> The rational justification for placing the burden of proof on a commitee is that his mental illness and dangerousness have previously been convincingly established. In light of those established facts, the law gives effect to a presumption of continuity of status. It comports with normal perceptions of reality—and hence is rational—to assume that, once a given status is proven to exist, it continues to do so in the absence of evidence showing the contrary to be more likely than not.

In *Waite*, however, the presumption was not applicable because unlike in the instant case, the appellant had never been afforded a post-acquittal judicial hearing on the question of his continued mental illness and dangerousness.

The availability of a jury trial under § 21-545(b) and the absence of such a right at a § 24-301(d) hearing is also an insubstantial difference because the findings of mental illness and dangerousness are based on expert testimony and are not matters uniquely within the province of a jury of lay persons. In *Addington v. Texas*, 441 U.S. 418, 429 (1979), the Court explained that in contrast to delinquency proceedings or criminal prosecutions where "the basic issue is a straightforward factual question—did the accused commit the act alleged," the factual questions in a civil commitment proceeding "represent only the beginning of the inquiry." The Court

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must prove to the court, by a preponderance of the evidence, that he is entitled to release. This instruction was approved in *United States v. Brawner*, 153 U.S.App.D.C. 1, 29-30, 471 F.2d 969, 997-98 (1972).

continued: "Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists." *Id.* (emphasis in original). Thus, both judge and juror are forced to rely on expert evidence in commitment proceedings, significantly diminishing the importance of their personal judgment, values and experience. In sum, because (1) an acquittee has a right to a jury determination of past insanity at his criminal trial; (2) it is reasonable to presume the continuation of a mental illness; and (3) a jury right in commitment proceedings is not as meaningful as it is in ordinary criminal cases, the absence of a jury right at a § 24-301(d) release hearing is not a substantial difference vis-à-vis § 21-545(b) civil commitment.

The second distinction between the two commitment procedures in the District of Columbia is the fact that the government bears the burden of proof in a § 21-545 (b) hearing, whereas in the 50-day release hearing, the acquittee must prove that he is no longer mentally ill or dangerous. It is entirely rational for the District to require an acquittee to prove his entitlement to release where he was the one to advocate the fact of his past insanity. Automatic § 301(d) commitment does not follow an acquittal by reason of insanity when the question of insanity is raised by the court or the prosecutor, rather than the defendant. *United States v. Wright*, 167 U.S.App.D.C. 309, 511 F.2d 1311 (1975). As mentioned above, the presumption that a mental condition continues is a reasonable one and it is also reasonable to require the person who raised the presumption to refute it by affirmative proof. Furthermore, whatever difference in risk allocation there might be between the two statutes as a result of who bears the burden of proof is mini-

mized by the fact that when the acquittee bears the burden, he need prove entitlement to release by only a preponderance of the evidence, the lowest standard of proof, whereas when the government bears the burden, it must prove insanity and dangerousness by a higher standard, namely that of clear and convincing evidence. *In re Nelson*, D.C.App., 408 A.2d 1233 (1979).

Yet this disparity in the level of proof by which mental illness and dangerousness are established under the two procedures, when not regarded as a counter-balance to the risk of non-persuasion, is another difference between § 24-301(d) and § 21-545(b) which must be justified as rationally related to the situational differences between acquittees and commitees. An acquittee's past insanity is proven by a preponderance of the evidence. His present insanity is determined by his failure to rebut, by a preponderance of the evidence, the presumption of continuing insanity. In contrast, a commitee's detention is based on clear and convincing evidence of mental illness and dangerousness. *In re Nelson, supra.*[22] The difference between these two standards is justified by the fact that Congress determined that a defendant raising an insanity defense should not have to meet a higher burden on such a relatively difficult issue. However, when the District seeks to commit a person who is disputing the

[22] Since appellant has not challenged his initial commitment, we view his argument as based on a present denial of equal protection. We note, however, that in May 1976, when appellant received his 50-day release hearing, the prevailing standard was proof beyond a reasonable doubt, *In re Hodges*, D.C.App., 325 A.2d 605 (1974) (overruled in *In re Nelson, supra*). The greater disparity in proof between the two commitment standards that existed when appellant was first committed would not alter our conclusion that the difference in the level of proof required is both rational and not so substantial as to violate equal protection.

fact of insanity or dangerousness, it is reasonable that the risk of error be more heavily thrust upon the government. *See Addington v. Texas, supra.*

In *Bolton, supra* at 10 n.50, 395 F.2d at 651 n.50, and in *United States v. Brown*, 155 U.S.App.D.C. 402, 478 F.2d 606 (1973), the circuit court also recognized that a preponderance standard is enough to provide equal protection to acquittees.

Appellant has argued that a series of later Supreme Court and circuit court decisions based on an equal protection theory support his entitlement to release as of the expiration of his hypothetical maximum prison term. However, the cases cited by appellant are all distinguishable.

In *Humphrey v. Cady*, 405 U.S. 504 (1972), a defendant convicted of contributing to the delinquency of a minor was committed to a "sex deviate facility" in a Wisconsin state prison in lieu of sentence. The statute authorizing such commitment provided an initial term equal to the maximum sentence the defendant could have received, and five-year renewals based on a judge-made finding of dangerousness. The statutory scheme in *Humphrey* clearly included an express punitive element evidenced by the limitation of the initial commitment term to a period corresponding to that applicable to those convicted.[23]

In the same term that it decided *Humphrey*, the Supreme Court held that indefinite confinement of a person

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[23] We disagree with the interpretation of *Humphrey* in *Waite v. Jacobs, supra* at 287, 475 F.2d at 398, that there is little difference between the position of an acquittee and that of a convicted defendant subject to the Wisconsin statute, since we have determined that there is no punitive element to § 301(d) commitments.

charged with a crime and found incompetent to stand trial violated equal protection because the criminal charges were insufficient to prove either that the defendant was dangerous or that he required treatment. *Jackson v. Indiana, supra. Jackson* is inapposite to the instant case because Jackson was never tried for the crime with which he was charged. *See United States v. Ecker, supra* at 49-51, 543 F.2d at 196-98 (distinguishing *Jackson* for same reason in equal protection challenge to § 24-301(e)). Since his continued detention was not based on any other evidentiary predicate of dangerousness, it therefore became invalid after "the reasonable period of time necessary to determine whether there is a substantial probability that [the person held] will attain [the] capacity [to stand trial] in the foreseeable future." *Id.* at 738.

Appellant's reliance on the District of Columbia Circuit cases of *Waite v. Jacobs, supra,* and *United States v. Brown, supra,* is also unavailing.[24] Waite was acquitted before the *Bolton* decision and therefore automatically committed after a finding of not guilty by reason of insanity without a judicial hearing on his continued mental illness and dangerousness, which was subsequently required by *Bolton* and codified in § 24-301(d)(2). Waite's commitment was therefore invalid from the beginning and arguably justifiable only as penal detention. As such, it was limited to the applicable maximum sentence period.

Brown was a "post-*Bolton*, pre-1970 amendments" acquittee who challenged the burden of proof at his post-

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[24] These cases are not formally binding on this court because they were decided after February 1, 1971, the effective date of the District of Columbia Court Reform and Criminal Procedure Act of 1970. *M.A.P. v. Ryan,* D.C.App., 285 A.2d 310 (1971).

acquittal judicial hearing. The Court of Appeals in *Brown* upheld the preponderance standard applied, justifying the difference in the level of proof vis-à-vis the level of proof required in § 21-545(b) proceedings by the "meaningful elements of responsibility" which an acquittee may have. Insofar as this reasoning suggests a punitive element to § 301(d) we reject it as inconsistent with our finding that the commitment scheme for acquittees is not intended to attribute any guilt or imply any social indebtedness in the excuse of a criminal offense. Therefore, we need not follow the dicta in *Brown* that "[t]he extent of [the commitment] period [justified by a post-*Bolton*, pre-1970 amendments commitment] calls [for] sound discretion, would take into account, *e.g.*, the nature of the crime (violent or not), nature of treatment given and response of the person, would generally not exceed five years, and should, of course, never exceed the maximum sentence for the offense, less mandatory release time." *Id.* at 408, 478 F.2d at 612. As previously explained, the only factors relevant to release from a mental institution are the acquittee's continued dangerousness and his need for treatment. Judicial limitations on the duration of confinement based on hypothetical prison terms or other arbitrary determinations of a maximum term of hospitalization, as suggested in *Brown*, have no relation to the purpose of the statute. In any event, the need for such limitations has been obviated by the enactment of the 1970 amendments to § 24-301.

For the foregoing reasons, the trial court's order denying appellant's right to immediate release or, in the alternative, civil commitment pursuant to D.C. Code 1973, § 21-545(b) is

Affirmed.

FERREN, *Associate Judge*, with whom NEWMAN, *Chief Judge*, and MACK, *Associate Judge*, join, dissenting: I continue to subscribe to our division opinion on rehearing, 411 A.2d 624 (1980), *vacating* 396 A.2d 183 (1978).

I.

Under the civil commitment process, D.C. Code 1973, §§ 21-541 to -545, the government has the burden of proving a person is mentally ill and dangerous to self or others—and proving it to a jury if the potential commitee so demands. *Id.* § 21-544. In contrast, under the "insane criminal" commitment process, D.C. Code 1973, §§ 24-301 to -303, a defendant acquitted by reason of insanity has the burden of proving he or she no longer is mentally ill or dangerous—without the right to a jury. *Id.* § 24-301(d)(2).

Our colleagues in the majority conclude that these differences in treatment of two classes of institutionalized persons—commitees and acquitees—do not violate the acquitee's constitutional right to equal protection of the laws. In response to the allegation that the procedural shortcuts in § 24-301 reflect a punitive purpose, in contrast with a wholly therapeutic purpose underlying the civil commitment process, the majority concludes "that there is no basis for finding § 301(d) punitive in any respect." *Ante* at 6.[1]

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[1] The majority maintains that the lesser protections in § 24-301—burden of proof on the acquitee, without right to jury trial—do not alter its equivalence to §§ 21-544 and -545, for the acquitee already has had a right to jury trial on the conduct manifesting insanity, and the shift in burden of proof is justified by a valid evidentiary presumption that the acquitee's insanity at the time of the offense—which he himself asserted—continues to the time of the release hear-

I do not understand the majority to disagree with the proposition that *if* § 24-301(d) imposes punishment in any respect, the analysis in our division opinion is constitutionally sound.[2] It would follow that, "because the

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ing. That hearing, therefore, unlike a civil commitment proceeding, is a procedure to update, not initiate, the inquiry.

In our division opinion on rehearing we rejected that analysis. We noted that the presumption of continuing insanity is questionable, spanning as it does months or even years between the time of the offense and the time of the release hearing. Furthermore, we saw that the courts analyzing criminal and civil commitment schemes in other jurisdictions "typically mix evidentiary and punitive rationales in justifying less comprehensive review of acquitees at 'release hearings' than is afforded civil commitees at such proceedings." 411 A.2d at 628-29 (footnote omitted). Differences such as a shift in the burden of proof and withdrawal of the right to a jury are commonly justified, in part, "by the public's interest in greater protection than it would be likely to receive by subjecting acquitees to the civil commitment process." *Id.* at 630. We concluded, therefore, that "the difference[s] between criminal and civil commitment procedures cannot be justified on purely evidentiary grounds." *Id.*

[2] In our division opinion on rehearing, we summarized our analysis:

> Assuming the best case for the constitutionality of § 24-301(d), appellant argues that its partially punitive character at least dictates, as a matter of equal protection vis-a-vis civil commitees, that acquitees be released (or civilly committed) no later than the end of the maximum prison term they would have received if criminally convicted. We agree.
>
> According to *Baxtrom* [*v. Herold*, 383 U.S. 107, 111 (1966)], "[e]qual protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made" (citation omitted). *Accord, Bolton* [*v. Harris*, 130 U.S.App.D.C. 1, 10, 395

maximum possible prison term for which appellant Michael Jones could have been incarcerated has expired, he is entitled to release from St. Elizabeths Hospital, subject to the government's right to seek civil commitment." 411 A.2d at 630.

I therefore propose to discuss in greater detail the determinative issue: whether § 24-301(d) is, to some extent, punitive.

II.

The Supreme Court has identified several factors for use in determining whether a statute is punitive. A court first should look for "objective manifestations of congressional purpose." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963). *Accord, Bell v. Wolfish*, 441 U.S. 520, 538 (1979). Where it is not clear on the face of the statute whether Congress had a punitive intent, a court must consider a variety of other factors:

F.2d 642, 651 (1968)]. On the basis of the partially punitive rationale for the criminal commitment scheme set forth earlier, *see* text and cases at note 9 *supra*, the criminal commitment scheme might survive equal protection scrutiny under *Baxstrom*, *supra*, even though the procedure for confining civil commitees provides greater protection for the individual at the outset (the right to a jury and burden of proof on the government). We agree with appellant, however, that there is no basis for confining an acquitee under § 24-301(d) beyond the length of the hypothetical maximum prison term, since that term marks the end of society's claim on that individual for any kind of punishment. Any longer confinement must depend, constitutionally, on a *de novo* civil commitment. *See Humphrey* [*v. Cady*, 405 U.S. 504, 510-11 (1972)]; *Baxstrom*[, *supra* at 110-11]; [*United States v. Brown*, 155 U.S.App.D.C. 402, 408, 478 F.2d 606, 612 (1973)].

411 A.2d at 630 (footnote omitted).

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. [*Kennedy, supra* at 168-69 (footnotes omitted).]

Accord, Bell, supra at 537-38. In the present case, we confront a statute for which Congress clearly had a punitive purpose.

A. *The Previous Statute and Judicial Construction*

Analysis begins with the previous statute. *See, Kennedy, supra* at 170. Under D.C. Code 1967, § 24-301(d), a defendant who successfully interposed the insanity defense was committed automatically—and indefinitely—to a mental institution. However, in *Bolton v. Harris*, 130 U.S.App.D.C. 1, 395 F.2d 642 (1968), the United States Court of Appeals for the District of Columbia Circuit held that automatic commitment of acquitees was unconstitutional—a denial of equal protection vis-a-vis commitees. The court accordingly required that, upon a finding of not guilty by reason of insanity, an acquitee was constitutionally entitled to the equivalent of a civil commitment proceeding, which came to be known as the "*Bolton* hearing."[3] Five years later, in *United States*

[3] In reaching this result, the court relied on *Baxstrom v. Herold*, 383 U.S. 107 (1966), and *Specht v. Patterson*, 386

v. Brown, 155 U.S.App.D.C. 402, 408, 478 F.2d 606, 612 (1973), the court held that even after a "*Bolton*" hearing the disparities of treatment were such that "insane criminal" commitment under D.C. Code 1967, § 24-301, having a partially punitive purpose, must be limited to the hypothetical maximum sentence (less mandatory release time), after which the acquitee would be entitled either to release or to a civil commitment proceeding. *Accord*, *Waite v. Jacobs*, 154 U.S.App.D.C. 281, 284-85, 475 F.2d 392, 395-96 (1973).

Apropos of *Brown*, the en banc majority concedes in the present case that the prior statute had "punitive aspects," a quality that *Bolton* was necessary to "undo." *Ante* at 7. And yet in the same paragraph the majority states that "[t]he 1970 amendments to § 301(d), enacted in response to" *Bolton*, "have not altered its original purpose," *ante* at 6-7, which the majority—in a nonsequitur—characterizes as nonpunitive by reference to *Hough v. United States*, 106 U.S.App.D.C. 192, 271 F.2d 458 (1959) and other pre-*Bolton* circuit court decisions. The majority, therefore, is inherently inconsistent. If, as the majority concedes, the pre-*Bolton* statute was punitive, to the point that *Bolton* was necessary to correct its unconstitutional impact, I do not see how statutory amendments "in response to *Bolton*," providing lesser protections, can be said automatically to remove the original, "punitive aspects" of that statute. The question remains: do the 1970 amendments modifying *Bolton* erase the punitive purpose of the previous statute?

U.S. 605 (1967). The circuit court expressly modified its earlier decisions in *Overholser v. O'Beirne*, 112 U.S.App. D.C. 267, 302 F.2d 852 (1961); *Ragsdale v. Overholser*, 108 U.S.App.D.C. 308, 281 F.2d 943 (1960); and *Overholser v. Leach*, 103 U.S.App.D.C. 289, 257 F.2d 667 (1958), *cert. denied*, 359 U.S. 1013 (1959). *Bolton*, *supra* at 12, 395 F.2d at 653.

B. *The Present Statute and Its Construction*

1. Legislative history confirms that, in amending § 24-301(d) in 1970, Congress held on to its original intent to punish the criminal offender, if not by conviction and imprisonment then by indefinite confinement in a mental institution. The overriding concern of the House of Representatives was that *Bolton* "permits dangerous *criminals* . . . 'to have it both ways'—to escape both conviction and con.....ent to a hospital." HOUSE COMM. ON THE DISTRICT OF COLUMBIA, DISTRICT OF COLUMBIA COURT REFORM AND CRIMINAL PRODEDURE ACT OF 1970, Section 207—*Insane Criminals*, at 74, H.R. REP. No. 91-907, 91st Cong., 2d Sess. (emphasis added) (quoting *Overholser v. O'Beirne*, 112 U.S.App.D.C. 267, 276, 302 F.2d 852, 861 (1961)). The House considered the possibility that a criminal offender could get off without being either convicted or hospitalized "intolerable." *Id. See United States v. Jackson*, 179 U.S.App.D.C. 375, 381-82, 553 F.2d 109, 115-16 (1976).

The congressional intention in drafting the present § 24-301(d), therefore, was "to meet the objections of the *Bolton* court while preserving the principle of the *mandatory commitment* of those who escape criminal responsibility on the ground of mental abnormality." *Bethea v. United States*, D.C.App., 365 A.2d 64, 92 n.62 (1976), *cert. denied*, 433 U.S. 911 (1977) (emphasis added). Congress wanted to confront the criminal defendant with a choice: conviction or "the very real possibility of prolonged therapeutic confinement." *Id.* at 90 (footnote omitted). Because "the prospect of commitment to a mental institution for an indefinite period is much less desirable than a fixed term in prison," *United States v. Freeman*, 357 F.2d 606, 626 n.60 (2d Cir. 1966), Congress intended the substantial likelihood of indefinite confinement to provide an effective deterrent to those tempted to misuse the insanity defense to avoid

criminal incarceration. In short, the legislative history of the 1970 amendments provides strong evidence that Congress, in overruling *Bolton*, intended to restore as much punishment under § 24-301(d) as constitutionally would pass muster.

2. More than the legislative history, the legislative result—the statute itself—reveals that Congress maintained its punishment objective.

First, the authorized procedures by which an acquitee may challenge confinement in a mental institution, D.C. Code 1973, §§ 24-301(d)(2), -(k)(1) through (6), do nothing more than institutionalize the habeas corpus procedure that already was available at the time of *Bolton*. *See Miller v. Cameron*, 118 U.S.App.D.C. 323, 324, 335 F.2d 986, 987 (1964); *O'Beirne, supra at* 275, 302 F.2d at 860; *Ragsdale v. Overholser*, 108 U.S.App.D.C. 308, 313-14, 281 F.2d 943, 948-49 (1960); D.C. Code 1967, § 24-301(g). Procedurally, therefore, the acquitee is no better off under § 24-301 today than he or she was under the same statute before 1970. Unless the acquitee can prove he or she is not mentally ill or dangerous, confinement under § 24-301 is both automatic and indefinite.[4]

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[4] My colleagues' implication that altering the burden of proof and denying acquitees a right to jury trial are minor procedural distinctions from civil commitment, *see ante* at 15-21, is inconsistent with Congress' purpose in amending the statute to overrule *Bolton*. As this court recognized in *Bethea, supra*, imposing the burden of proof on the acquitee is a significant procedural distinction from civil commitment; it is designed to make it more difficult for the acquitee to gain freedom. *Id.* at 91-92. Indeed, where proof is often difficult to assess, *see Addington v. Texas*, 441 U.S. 418, 429 (1979), "the allocation of the burden of proof may be outcome determinative." *Waite supra* at 284, 475 F.2d at 395.

The majority's discounting of the role of the jury when questions of mental capacity are at issue is also in direct

Second, upon confinement, acquitees are not necessarily treated the same as commitees. In this jurisdiction, an individual is found not guilty by reason of insanity if "as a result of a *mental disease* or *defect* he lacked substantial capacity either to recognize the wrongfulness of his conduct or to conform his conduct to the requirements of law." *Bethea, supra* at 79 (emphasis added). Ordinarily, this jurisdiction treats individuals suffering from a mental "defect" (*i.e.*, mental retardation) differently from the way it treats individuals suffering from a mental illness. Under civil commitment procedures, a mentally defective individual who is "not insane nor of unsound mind to such an extent to require his commitment to a hospital for the mentally ill" is committed to Forest Haven, a facility for retarded persons. D.C. Code 1973, §§ 21-1101, 32-601. In contrast, an acquitee, even if only suffering from a mental defect, is committed to a hospital for the mentally ill, Saint Elizabeths. *Id.*, § 24-301 (d).

In *United States v. Jackson, supra*, the court upheld this distinction in treatment precisely because it recog-

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conflict with our ruling in *Bethea, supra*, which emphasized that, despite the impact of psychiatric testimony, it is for the jury, not the psychiatric expert, to decide the accused's mental state. *Id.* at 82-83. The majority's emphasis on the factfinder's reliance on expert testimony in accessing the accused's mental state (and thus on the lesser need for a jury) was recently rejected by the United States Court of Appeals for the District of Columbia Circuit in *United States v. Ecker*, 177 U.S.App.D.C. 31, 543 F.2d 178 (1976), *cert. denied*, 429 U.S. 1063 (1977). There, the court upheld the trial court's refusal to release an acquitee from a mental hospital despite the recommendations of his doctors, stating, "*the district court must independently 'weigh the evidence' and make a de novo determination* that the patient will not in the reasonable future endanger himself or others." *Id.* at 40, 543 F.2d at 187 (emphasis in the original).

nized that Congress "intended that *all* defendants acquitted by reason of insanity should be distinguished from all other persons, including persons civilly committed for mental diseases or retardation." *Id.* at 381, 553 F.2d at 115 (emphasis in original). In *Jackson*, the court justified this difference in treatment on the basis that acquitees, but for their insanity plea, had been found guilty of crimes against society. *Id.* at 387, 553 F.2d at 121. Apropos of *Jackson*, this difference in treatment of certain acquitees cannot possibly be justified merely on the basis of an evidentiary presumption concerning the continuing mental condition of the acquitee. *See* note 1 *supra*. Rather, it is an express statutory provision, justified by reference to the criminality of the acquitee's prior conduct.

Third, and perhaps most telling, is another example of differing possibilities for release of acquitees and commitees after confinement. When the superintendent of Saint Elizabeths Hospital certifies that a commitee is cured, the individual is discharged from the hospital. D.C. Code 1973, § 21-590. In contrast, when the hospital superintendent certifies that an acquitee has recovered, the government may demand a hearing. At this hearing, if the court is not convinced that the acquitee has recovered, the court may order his or her return to the hospital even though the authorities there consider the individual well enough for release. D.C. Code 1973, § 24-301(e).

In *United States v. Ecker*, 177 U.S.App.D.C. 31, 543 F.2d 178 (1976), *cert. denied*, 429 U.S. 1063 (1977), an acquitee challenged the constitutional validity of this added hurdle—court approval—before release. Five years after a jury had found the defendant not guilty of rape and murder by reason of insanity, the superintendent of Saint Elizabeths recommended conditional release. After a hearing, despite the recommendation of the examining psychiatrists, the trial court denied the hospital's re-

quest and ordered continued hospital confinement. In upholding the statute and the trial court's decision, the federal circuit court expressly relied on the fact that Ecker had committed a violent criminal act.[6] *Id.* at 52, 543 F.2d at 199. Whether or not the hospital psychiatrists thought Ecker should be released, the trial court had a duty to protect "the public against whom the acquitee has already been shown to have committed one or more criminal acts, thus differentiating himself from the civil commitee." *Id.* at 51, 543 F.2d at 198. "More importantly," the court rejected Ecker's equal protection argument based on *Jackson v. Indiana*, 406 U.S. 715 (1972), *Baxstrom v. Herold*, 383 U.S. 107 (1966), and *Humphrey v. Cady*, 405 U.S. 504 (1972), reasoning "that the criminal conviction may justify some differences in procedural safeguards if the differences are 'limited by the nature of the defendant's crime *or the maximum sentence authorized for that crime*'" *Id.* at 51-52, 543 F.2d at 198-99 (quoting *Humphrey*, *supra* at 511) (emphasis added). Because Ecker could have been incarcerated, however, for a life sentence if not acquitted by reason of insanity, the differences in release procedures (between acquitees and commitees) were therefore justifiable. Finally, the court rejected the hospital recommendation by saying that even if the hospital were correct "that a step-by-step reentry into the community [was] essential to Ecker's continued improvement," an acquitee "who has committed violent criminal acts" has "no right to treatment at the community's peril." *Id.* at 52-53, 543 F.2d 199-200.

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[6] The circuit court, more than once, has relied on the nature of the underlying offense to justify the consequences of confinement under § 24-301(d). In *United States v. Jackson*, *supra*, the court emphasized that the defendant had been acquitted by reason of insanity of first degree burglary and rape, in contrast with mere theft of small sums which would "not indicate excessive dangerousness." *Id.* at 387, 553 F.2d at 121.

Given the legislative history, the differences in treatment of acquitees and commitees, and the judicial gloss on the statute by decisions such as *Ecker*, the majority's position that the purpose of the statute is solely to "treat[] and rehabilitat[e] mental patients who happen to have been acquitted of crimes by reason of insanity," *ante* at 10, is unsupportable. Acquitees are not just mental patients "who happen" to have been acquitted of crimes by reason of insanity. The fact of their criminal conduct continues to play a decisive role in the nature of their treatment and their chances for release after initial commitment. Congress and the courts have justified this harsher treatment precisely because acquitees have committed crimes.

C. *The Relevance of the Statutory Maximum Sentence*

The majority rejects the use of statutory maximum sentences to determine the maximum length of confinement under § 24-301 because such maximums have "no relationship to the purposes of mental care and treatment." *Ante* at 8. I agree. The majority states that "[t]he notion that the duration of an acquitee's hospitalization can be established by statute or court order ignores the most basic precepts of medicine and psychiatry. . . ." *Ante* at 10. Again, I agree. If the acquitee were hospitalized solely for medical reasons, I would be the first to concur that a statutory maximum for confinement based on the nature of the acquitee's criminal conduct would have no relevance or application. But the problem is—and is so clearly evident in *Ecker*—that acquitees are not confined to mental institutions for medical reasons alone. They are confined there in part because society is unwilling to allow those who have committed crimes to escape without paying for their crimes. The intent of the statute is partially punitive, and thus the procedures under § 24-301 reflect this added burden on the defend-

ant. Because of this punitive purpose, the maximum statutory period of confinement becomes relevant, for at that point society no longer has a valid interest in continued confinement on the basis of a shortcut procedure. *Brown*, *supra* at 408, 478 F.2d at 612; *see Waite*, *supra* at 285, 475 F.2d at 396; note 2 *supra*.*

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* Although the foregoing discussion is sufficient to demonstrate the congressional purpose underlying D.C. Code 1973, § 24-301, I note briefly that the other *Kennedy* factors confirm the punitive intent.

By definition, confinement to a mental institution is "an affirmative disability or restraint," *id.* at 168, even more perhaps than imprisonment, *see Vitek v. Jones*, 445 U.S. 480, 493-94 (1980), given the indefinite duration and the stigma. *See Addington*, *supra* at 425-26. Despite its use for treatment, moreover, confinement for mental illness and dangerousness as a consequence of a criminal act "has historically been regarded as a punishment," *Kennedy*, *supra* at 168, for which the Supreme Court continually has had to write constitutional guidelines. *See, e.g., Jackson v. Indiana*, *supra*; *Humphrey*, *supra*; *Specht*, *supra*; *Baxstrom*, *supra*.

Criminal confinement also comes into play "only on a finding of *scienter*," *Kennedy*, *supra* at 168; *see Bethea*, *supra* at 94, and "the behavior to which it applies is already a crime," *Kennedy*, *supra* at 168, by virtue of the criminal conviction that precedes it. The statute also "promote[s] the traditional aims of punishment—retribution and deterrence," *id.*, for, as already indicated, Congress and this court have noted a desire to prevent the misuse of the insanity defense by making the consequences more severe than *de novo* civil commitment. In addition, criminal confinement at a mental institution serves other goals of punishment, incapacitation and rehabilitation. *See United States v. Brown*, 381 U.S. 437, 458 (1965) ("Punishment serves several purpose: retributive, rehabilitative, deterrent—and preventive"). *See generally* J. VORENBERG, CRIMINAL LAW & PROCEDURE 44-57 (1975).

Finally, for reasons already discussed, I do not believe there is a wholly nonpunitive, "alternative purpose," *Ken-*

III.

Society's right to punish Michael Jones for his first offense, a misdemeanor—stealing a coat—has long since expired. As every day passes he is denied equal protection of the laws.[7] Michael Jones should be released unless civilly committed.

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nedy, supra at 168-69, assignable to § 24-301; but even if the purposes assigned by the majority—treatment of the acquitee and protection of society—were altogether nonpunitive, the indefinite confinement of Michael Jones for stealing a coat is well beyond any public protection gloss on the statute's purpose. It is one thing to keep an acquitee of murder and rape confined for life, *see Ecker, supra*, as he would be under appellant's theory here, for those are life-sentence crimes. But society has no "protection" interest in confining Michael Jones indefinitely for stealing a coat, a misdemeanor punishable by maximum confinement for one year.

[7] When a court confronts different procedural safeguards afforded to different classes of individuals committed to mental institutions, concerns of equal protection and due process become interrelated. *See Jackson v. Indiana, supra* at 731; *cf. Humphrey, supra* at 511 (1972) (noting with favor the state court's consideration of Equal Protection Clause as relevant to procedural due process analysis); *Specht, supra* at 608 (commitment proceedings for sex offenders subject both to Equal Protection and Due Process Clauses). In evaluating equal protection for the acquitee, I have not reached the question of due process as an independent concern, although there is a serious question here. I note, moreover, that any effort to reduce the procedural safeguards afforded to civil commitees, while possibly resolving equal protection problems, would raise serious questions of due process for that class of individuals.

No. 81-5195

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MICHAEL JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was deprived of liberty without due process of law by his commitment to a hospital for treatment resulting from his acquittal on a criminal charge on grounds of insanity or by the procedures governing the continuation of his commitment.

2. Whether principles of equal protection require that an individual, committed to a mental hospital following an acquittal, based upon an affirmative finding of insanity, at his trial on criminal charges, be released upon expiration of the maximum prison sentence he could have received if convicted of the criminal act he performed, unless he is recommitted under the separate civil commitment procedure.

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. A) and the opinion of the panel upon rehearing (Pet. App. B) are reported at 396 A.2d 183 and 411 A.2d 624, respectively. The opinion of the en banc court of appeals (Pet. App. C) is reported at 432 A.2d 364.

JURISDICTION

The judgment of the en banc court of appeals was entered on May 29, 1981. The petition for a writ of certiorari was filed on August 6, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATEMENT

1. The facts and procedural history of this case are set forth in the opinion of the en banc court of appeals (Pet. App. C 2-5). Briefly, petitioner is a patient at St. Elizabeths

Hospital in the District of Columbia, where he has been committed as a dangerously insane individual since March 1976, pursuant to D.C. Code 24-301(d). 1/ His commitment resulted from a charge of

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1/ D.C. Code 24-301(d), which governs the commitment of persons found not guilty by reason of insanity in the District of Columbia (acquittees), provides:

> (1) If any person tried upon an indictment or information for an offense raises the defense of insanity and is acquitted solely on the ground that he was insane at the time of its commission, he shall be committed to a hospital for the mentally ill until such time as he is eligible for release pursuant to this subsection or subsection (e).
>
> (2) A person confined pursuant to paragraph (1) shall have a hearing, unless waived, within 50 days of his confinement to determine whether he is entitled to release from custody. At the conclusion of the criminal action referred to in paragraph (1) of this subsection, the court shall provide such person with representation by counsel -
>
> > (A) in the case of a person who is eligible to have counsel appointed by the court, by continuing any appointment of counsel made to represent such person in the prior criminal action or by appointing new counsel; or
> >
> > (B) in the case of a person who is not eligible to have counsel appointed by the court, by assuring representation by retained counsel.
>
> If the hearing is not waived, the court shall cause notice of the hearing to be served upon the person, his counsel, and the prosecuting attorney and hold the hearing. Within ten days from the date the hearing was begun, the court shall determine the issues and make findings of fact and conclusions of law with respect thereto. The person confined shall have the burden of proof. If the court finds by a preponderance of the evidence that the person confined is entitled to his release from custody, either conditional or unconditional, the court shall enter such an order as may appear appropriate.

Under D.C. Code 24-301(e), a person is entitled to unconditional release from St. Elizabeths upon certification by (Continued)

attempted petit larceny brought against him in September of 1975. Following a pretrial commitment to St. Elizabeths for a court-ordered competency examination, 2/ and waiver of his right to a jury trial, petitioner was acquitted by reason of insanity in a bench trial upon stipulated facts in the Superior Court of

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the Superintendent of St. Elizabeths Hospital that the individual has recovered his sanity and will not be dangerous to himself or others. If the prosecuting authority objects to release upon such a certification, the court must hold an evidentiary hearing to determine whether "such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others" and must order release if it so finds. Ibid. The court may elect to hold such a hearing sua sponte as well, upon receipt of a release certification. The statutory standard has been construed to require that there "be freedom from such abnormal mental condition as would make the individual dangerous to himself or the community, in the reasonably foreseeable future." Overholser v. Leach, 103 U.S. App. D.C. 289, 292, 257 F.2d 667, 670 (1958) [footnotes omitted], cert. denied, 359 U.S. 1013 (1959), overruled in other respects, Bolton v. Harris, 130 U.S. App. D.C. 1, 12, 395 F.2d 642, 653 (1968); see United States v. Brawner, 153 U.S. App. D.C. 1, 41-42, 471 F.2d 969, 1009-1010 (1972) (en banc). Conditional release may be obtained upon certification by the Superintendent, subject to judicial review as described above, that the patient's recovery has advanced to the point that the conditions prescribed suffice to assure that the patient "will not in the reasonable future be dangerous to himself or others," Hough v. United States, 106 U.S. App. D.C. 192, 195, 271 F.2d 458, 461 (1959). See also United States v. Ecker, 177 U.S. App. D.C. 31, 37, 47-52, 543 F.2d 178, 184, 194-199 (1976), cert. denied, 429 U.S. 1063 (1977).

Section 301(k) provides a committed individual the right to initiate a judicial proceeding to determine his right to release. D.C. Code 24-301(g) also provides for release upon writ of habeas corpus. Under either procedure initiated by a committed acquittee, as in the release hearing prescribed under D.C. Code 24-301(d)(2), the burden of proving eligibility for release, by a preponderance of the evidence, is placed upon the patient. D.C. Code 24-301(k); Bolton v. Harris, supra, 130 U.S. App. D.C. at 12, 395 F.2d at 653 (1968). The assignment of the burden of proof in Section 301(e) proceedings is less clearly established. See United States v. Ecker, supra, 177 U.S. App. D.C. at 44-47, 543 F.2d at 191-194 (Wilkey, J.), 177 U.S. App. D.C. at 53-54, 543 F.2d 200-201 (Lumbard, J.), 177 U.S. App. D.C. at 55-56 & notes 5 and 6, 543 F.2d at 202-203 & notes 5 and 6 (Wright, J.).

2/ See D.C. Code 24-301(a). The examining psychologist reported that petitioner was competent to stand trial, but had "signs and symptons of a severe mental disorder, including auditory hallucinations," warranting hospitalization at St. Elizabeths for treatment (Pet. App. C 4 n.3).

the District of Columbia; the stipulation showed both that he had committed the crime and that the crime resulted from his mental illness. By operation of law (D.C. Code 24-301(d)(1)), petitioner was initially committed for treatment to St. Elizabeths Hospital upon his acquittal. On May 25, 1976, following the statutory "50-day release hearing," the court ordered petitioner's further confinement at St. Elizabeths because he had failed to prove by a preponderance of the evidence that he was no longer mentally ill or dangerous to himself or others. 3/

At a second hearing, on November 29, 1976, petitioner asserted that he was entitled to immediate release from the hospital unless civilly committed, because the maximum prison sentence that he could have received had he been convicted of the crime charged (one year's imprisonment) had expired. Petitioner argued that failure at that juncture to afford him the procedures applied to persons whom the government seeks to commit by civil process denied him equal protection of the laws guaranteed by the

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3/ In an April 23, 1976, letter to the court, the Superintendent of St. Elizabeths stated that petitioner was suffering from schizophrenia, paranoid type, and was receiving medication. He added that "Mr. Jones is in need of further hospitalization, and by virtue of his mental illness, he would be a danger to himself and to others if released into the community at this time" (Pet. App. C 5 n.5).

Due Process Clause of the Fifth Amendment. 4/ After a further hearing in February of 1977, the court denied the requested relief and directed petitioner's continued confinement at St. Elizabeths. 5/

4/ The procedures governing civil commitment in the District of Columbia are contained in D.C. Code 21-541 et seq. Civil commitment may be ordered after a hearing at which the petitioner (usually the Superintendent of St. Elizabeths Hospital) must prove by clear and convincing evidence (to a jury if the respondent requests one) that the respondent is both mentally ill and dangerous to himself or others. D.C. Code 21-545(b); In re Nelson, 408 A.2d 1233 (D.C. App. 1979). Prior to this Court's decision in Addington v. Texas, 441 U.S. 418 (1979), the required quantum of proof was held to be proof beyond a reasonable doubt. See In re Hodges, 325 A.2d 605 (D.C. App. 1974); In re Ballay, 157 U.S. App. D.C. 59, 482 F.2d 648 (1973). In re Nelson, supra, announced the present standard, formulated in light of Addington.

Release from civil commitment may be secured by any of several procedures. First, the chief of service of the hospital with custody is obliged to examine all committees at intervals no greater than every six months, and to release those who no longer meet the statutory standard for commitment. D.C. Code 21-548. If release is not initiated by the hospital, a patient or his representative may, periodically, secure an examination by hospital physicians, and by an independent physician. D.C. Code 21-546. The chief of the hospital service may determine that the committee is to be released upon the basis of these reports. Ibid. If he concludes otherwise, but one of the examining physicians dissents from his decision, the patient is authorized to petition the court for release pursuant to D.C. Code 21-547. Finally, a patient may seek release upon a petition for a writ of habeas corpus, by demonstrating that the statutory standard for commitment is no longer satisfied. D.C. Code 21-549. The burden of establishing the right to release, by a preponderance of the evidence, is assigned to the patient. Bolton v. Harris, supra, 130 U.S. App. D.C. at 12, 395 F.2d at 653.

5/ Petitioner subsequently moved for his unconditional release under D.C. Code 24-301(k) (see note 1, supra) but the motion was denied. Three months later, he was granted conditional release on terms recommended by the St. Elizabeths' staff, which allowed him to make daytime and overnight visits into the community (see D.C. Code 24-301(e)). He was also admitted into the civil division of the hospital, although as a result of disruptive behavior he was retransferred to the forensic division. Following the second decision by the panel of the court of appeals (see text, infra), petitioner was unconditionally released from St. Elizabeths, but he was subsequently recommitted to the hospital and remains there at the present time.

2. Petitioner appealed from this order and renewed his contention that the Constitution required that he be released from the hospital upon the expiration of his hypothetical maximum sentence unless the government invoked the procedures for civil commitment. A panel of the court of appeals initially rejected this argument (Pet. App. A) 6/ but later granted rehearing and reversed itself. The panel ultimately held that the purpose of commitment of an insanity acquittee under D.C. Code 24-301(d) is "partially punitive," that commitment on these terms justifies the confinement of acquittees for treatment only until their hypothetical maximum sentence has expired; and that no basis exists thereafter for denying them the protection of the

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6/ Before the panel, petitioner did not challenge the validity of his initial commitment, but only the continuation of his commitment after expiration of the maximum sentence he could have received if convicted (see Pet. App. A 2, 4; Pet. App. B 2-4). In its initial opinion the panel also took petitioner to concede that the Section 301(d) procedure constituted a means of determining the presence of mental illness and whether or not he was dangerous that was comparable, for constitutional purposes, to the civil commitment procedure--i.e., that the procedural differences between the Section 301(d)(2) release hearing and the civil commitment procedure were rationally related to the different situations in which insanity acquittees and potential civil committees found themselves, and were not based upon a punitive motive (Pet. App. A 8, 13-14). Given this premise, the court concluded that "the length of a hypothetical prison term has no relationship to the rehabilitative goal of hospital confinement" and accordingly denied petitioner's request for immediate release (id. at 15). The court added (Pet. App. A 16), however, that equal protection requires that committed insanity acquittees be examined every six months by the Superintendent or his subordinates for the purpose of determining whether such patients are eligible for release under Section 301(e), a procedure prescribed by statute only for civil committees. See notes 1 and 4, supra.

Judge Mack concurred in the judgment (Pet. App. A 17) on the understanding that the panel had not reached constitutional questions as to the procedures surrounding the commitment of persons acquitted of criminal charges by reason of insanity.

procedure for civil commitment (Pet. App. B 11-15). 7/ The panel accordingly directed release of petitioner unless de novo civil commitment proceedings were initiated, leading to a new commitment order (id. at B 14). The en banc court of appeals reversed the panel decision, however, and upheld the trial court's order (Pet. App. C). 8/ The court concluded, first, that "there is no basis for finding §301(d) punitive in any respect," holding that its purposes are "exclusively remedial and protective" and that "punitive rationale has no part in the commitment of persons acquitted by reason of insanity" (Pet. App. C 6-12). Moreover, the court stated (Pet. App. C 8 to C 10; footnote omitted):

> [P]lain reason compels rejection of [petitioner's] reliance on his hypothetical maximum prison term as artificial and meaning-

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7/ On rehearing petitioner persuaded the panel that it had misconstrued his argument in its original opinion (see note 6, supra). He asserted that he had assumed, arguendo, the adequacy of the basic Section 301(d) procedure only on the understanding that the procedural differences between it and the civil commitment procedure were permissible precisely because of the partially punitive nature of the commitment of insanity acquittees. He argued further that it was just this aspect of the Section 301(d) commitment which made continuation of the confinement decreed thereunder impermissible once the hypothetical maximum permissible sentence had expired (Pet. App. B 4-7). In its opinion on rehearing, a divided panel agreed with petitioner that the difference between the Section 301(d) release hearing and the civil commitment procedure could not be justified by considerations apart from a punitive rationale and that commitment of insane acquittees accordingly had a partially punitive rationale (id. at 12-13). The court concluded that the punitive rationale for disparate treatment was extinguished by the expiration of the maximum hypothetical sentence "since that term marks the end of society's claim on that individual for any kind of punishment" (id. at 14). Upon rehearing the panel did not address the question raised in its first opinion, seemingly sua sponte, whether periodic examinations of insanity acquittees, similar to those prescribed by statute for civil committees, are required by considerations of equal protection. See note 6, supra.

Judge Mack concurred in the judgment (Pet. App. B 15) and Judge Kelly dissented (id.), adhering to the initial panel decision.

8/ Three judges dissented (Pet. App. C 25-37), adhering to the conclusion reached by the panel on rehearing.

> less. Statutory maximum sentences have no relationship to the purpose of mental care and treatment. They are intended rather, to set the outer boundaries of lawful punishment for persons found criminally responsible for specified offenses. * * * Subsection 301(d) commitments are neither expressly nor impliedly related to statutory maximum sentences. To the contrary, §301(d) contemplates an indeterminate period of confinement and treatment, depending on when the patient has recovered his sanity or no longer poses a danger to himself or others. * * *
>
> [R]eference to either a hypothetical maximum prison sentence, or even to a judically limited commitment term would completely refute the statutory purpose of §301(d) and would frustrate any attempt at treating and rehabilitating mental patients who happen to have been acquitted of crimes by reason of insanity.

The court then rejected petitioner's contention that his commitment under Section 301(d) denied him equal protection of the laws because it was based on procedures less protective than those afforded persons who have been civilly committed. At the outset the court stressed that both forms of commitment prescribed by law in the District of Columbia provide "the essential due process rights associated with involuntary commitment" (Pet. App. C 15-16). 9/ The court identified three differences between the two statutory schemes for commitment: (1) the unavailability of a jury trial at the 50-day hearing under Section 301(d)(2); (2) the shift of the burden of proof to the acquittee under Section 301(d)(2); and (3) the different quantum of proof required for commitment under Section 301(d)(2). 10/ Each feature of the criminal commitment process

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9/ According to the court, D.C. Code 24-301(e) establishes the substantive standard for commitment under Section 301(d): a showing of mental illness and dangerousness "identical" to that required by D.C. Code 21-545(b) in civil commitment proceedings. In addition, both procedures mandate a judicial hearing and determination, and notice, and provide for assistance of counsel, to be appointed by the court if necessary (Pet. App. C 13).

10/ The court noted (Pet. App. C 17) that it had not considered any differences in post-commitment procedures. See notes 1 and 4, supra. Any such differences were deemed to lie outside the scope of the petitioner's argument. Compare notes 6 and 7, supra.

was held to be justified by the exceptional procedural posture of persons who have been acquitted of a criminal offense by reason of insanity (Pet. App. C 17-22).

The court concluded that the unavailability to an acquittee in a 50-day release hearing of the jury trial afforded to potential civil committees is "justified by the fact that the acquittee has had right to jury determination of his sanity at the time of the offense" (Pet. App. C 17-18). The court noted that "the acquittee's illness is initially established by affirmative proof," adding that dangerousness is no less validly established by proof that the defendant committed the criminal act, a finding necessarily underlying an acquittal by reason of insanity" (Pet. App. C 18). The court accordingly held that "[t]he fact that [petitioner's present] mental illness and dangerousness are not jury determined, but derived from a prior jury finding, is not significant since the continuation of these attributes is a rational and permissible evidentiary presumption" (Pet. App. C 18; footnote omitted).

The court also upheld the shift of the burden of proof to the acquittee in the 50-day release hearing (Pet. App. C 20-21):

> It is entirely rational for the District [of Columbia] to require an acquittee to prove his entitlement to release where he was the one to advocate the fact of his past insanity. Automatic § 301(d) commitment does not follow an acquittal by reason of insanity when the question of insanity is raised by the court or the prosecutor, rather than the defendant. United States v. Wright, 167 U.S. App. D.C. 309, 511 F.2d 1311 (1975). As mentioned above, the presumption that a mental condition continues is a reasonable one and it is also reasonable to require the person who raised the presumption to refute it by affirmative proof. Furthermore, whatever difference in risk allocation there might be between the two statutes as a result of who bears the burden of proof is minimized by the fact that when the acquittee bears the burden, he need prove entitlement to release by only a preponderance of the evidence, the lowest standard of proof, whereas when the government bears the burden, it must prove insanity and dangerousness by a higher standard, namely that of clear and convincing evidence. In re Nelson, D.C. App., 408 A.2d 1233 (1979).

Finally, the court rejected petitioner's contention that the differing levels of proof under the two procedures violates equal protection (Pet. App. C 21-22; footnote omitted):

> An acquittee's past insanity is proven by a preponderance of the evidence. His present insanity is determined by his failure to rebut, by a preponderance of the evidence, the presumption of continuing insanity. In contrast, a committee's detention is based on clear and convincing evidence of mental illness and dangerousness. In re Nelson, supra. The difference between those two standards is justified by the fact that Congress determined that a defendant raising an insanity defense should not have to meet a higher burden on such a relatively difficult issue. However, when the District [of Columbia] seeks to commit a person who is disputing the fact of insanity or dangerousness, it is reasonable that the risk of error be more heavily thrust upon the government. See Addington v. Texas, [441 U.S. 418 (1979)].

ARGUMENT

Petitioner contends that his commitment pursuant to D.C. Code 24-301(d) following his acquittal on a criminal charge by reason of insanity denied him due process and was inconsistent with Addington v. Texas, 441 U.S. 418 (1979), because he had not been proven committable by clear and convincing evidence. He further contends that his continued confinement beyond the maximum prison sentence he could have received had he been convicted, denies him equal protection of the laws, unless it is based upon a fresh determination of committability under the procedures afforded at the outset to those who are involuntarily civilly committed. Both contentions are unfounded.

Petitioner was committed under a comprehensive scheme fashioned by Congress for the adjudication of claims of insanity raised as a defense to a criminal charge and for the evaluation and treatment of persons who have successfully raised the

insanity defense (hereinafter "insanity acquittees"). See Lynch v. Overholser, 369 U.S. 705 (1962). 11/ The court of appeals correctly concluded that Section 301(d) provides insanity acquittees with procedural protections that are constitutionally adequate and that are not impermissibly different from those

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11/ D.C. Code 24-301(d) was amended by Congress in 1955 to provide for automatic commitment of acquittees, in response to the decision in Durham v. United States, 94 U.S. App. D.C. 228, 214 F.2d 862 (1954), which was perceived as broadening the insanity defense and, absent remedial legislation, making possible the release of dangerously insane individuals found to lack criminal responsibility. See Lynch v. Overholser, supra, 369 U.S. at 715; Ragsdale v. Overholser, 108 U.S. App. D.C. 308, 312, 281 F.2d 943, 947 (1960).

Prior to 1970, a person could be acquitted of a crime by reason of insanity in the District of Columbia if the government failed to prove his sanity at the time of the crime beyond a reasonable doubt--the rule generally applicable to federal prosecutions. Davis v. United States, 160 U.S. 469 (1895); see Leland v. Oregon, 343 U.S. 790, 797 (1952). In 1970, as part of the District of Columbia Court Reform and Criminal Procedure Act, Pub. L. 91-358, 84 Stat. 473, Congress made insanity an affirmative defense in the District of Columbia, requiring the defendant to plead and to prove by a preponderance of the evidence that he was insane at the time of the criminal act and that his insanity caused the act. D.C. Code 24-301(j); see Bethea v. United States, 365 A.2d 64 (D.C. App. 1976), cert. denied, 433 U.S. 911 (1977); United States v. Greene, 160 U.S. App. D.C. 21, 489 F.2d 1145 (1973), cert. denied, 419 U.S. 977 (1974).

At the same time, Congress amended D.C. Code 24-301(d) to prescribe that a hearing be held 50 days after the initial commitment of an insanity acquittee to determine whether continued commitment of the patient is warranted. See page 4 and note 1, supra. Such a hearing had been held constitutionally required in cases arising under the pre-1970 form of the insanity defense, because automatic commitment would otherwise follow whenever the government failed to prove insanity at the time of the crime beyond a reasonable doubt--a showing deemed an insufficient index of need for commitment upon acquittal to pass an equal protection challenge grounded on the difference between this procedure and the civil commitment procedure. See note 4, supra. Bolton v. Harris, supra, 130 U.S. App. D.C. at 7-11, 395 F.2d at 648-652.

The 1970 Act also clarified Section 301(d) to make explicit that, as this Court had held in Lynch v. Overholser, supra, commitment under Section 301(d) does not follow from an insanity acquittal unless the defense was pressed by the defendant. See United States v. Wright, 167 U.S. App. D.C. 309, 511 F.2d 1311 (1975).

prescribed by D.C. Code 21-545 for persons committed in proceedings not triggered by acquittal of a crime by reason of insanity (hereinafter "civil committees"). 12/ Contrary to petitioner's contention, the court of appeals' decision does not conflict with any decision of this Court. Nor does it conflict with the decisions of the United States Court of Appeals for the District of Columbia Circuit upon which petitioner relies. There is accordingly no occasion for further review.

1. Petitioner first contends (Pet. 7-8), relying upon Addington v. Texas, supra, that his commitment deprived him of his liberty without due process because the government was not required, under D.C. Code 24-301(d), to establish by clear and convincing evidence that he was mentally ill and dangerous to himself or others. 13/ Petitioner's reliance upon Addington is misplaced. Unlike Addington, whom the State of Texas sought to commit civilly, petitioner had, prior to commitment,

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12/ Technically, of course, proceedings under Section 301(d)(2) are also civil proceedings (see Pet. App. C 10 n.10).

13/ In the court of appeals petitioner's argument focused upon the duration of his commitment, rather than the validity of the procedure by which he was initially committed. See notes 6 and 7, supra. This Court rendered its decision in Addington v. Texas, supra, subsequent to reargument to the court of appeals panel, but prior to entry of the panel's second opinion. No supplemental brief addressing Addington or advancing a due process claim was submitted to the panel by petitioner. Nor did petitioner submit a supplemental brief on the Addington issue to the en banc court of appeals. We are informed, however, that petitioner's counsel did discuss Addington in some measure at oral argument before the en banc court of appeals. These circumstances no doubt account for the brevity of the en banc court of appeals' discussion of the issue relating to the validity of the initial commitment, which was evidently not perceived to be the basis of an independent claim (see Pet. App. C 15-16). Although we believe that the due process argument pressed by petitioner in this Court is adequately addressed by the opinion below, it is also true that these contentions were not raised below in their present form. The Court may accordingly wish to treat them as not properly preserved for its review.

affirmatively pleaded mental illness as a defense to the crime charged and had carried the burden of proving that mental illness constituting legal insanity was the cause of his criminal act. Petitioner further agreed--as he acknowledges here (Pet. 12)--that he had in fact committed the criminal act charged. 14/ Finally, petitioner was provided a prompt and fair hearing at which he was unable to demonstrate that he was no longer dangerously mentally ill. 15/ At petitioner's 50-day release hearing, affirmative proof of the basis for continued confinement was produced--a report from the Superintendent of St. Elizabeths stating that petitioner was still suffering from schizophrenia and concluding that his release would endanger himself and others (Pet. App. C 5 n.5). Thus, contrary to petitioner's contention

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14/ D.C. Code 24-301(d) applies only when an acquittal is based solely upon a finding of insanity. A jury verdict of acquittal resting solely upon such a finding is required to contain a statement to that effect. D.C. Code 24-301(c).

15/ The court of appeals interpreted the substantive standard for commitment under Section 301(d) to be "identical" to that prescribed by D.C. Code 21-545(b) for civil committees (Pet. App. C 15). Accordingly, we assume that continued commitment would not result if, in the 50 day release hearing, an insanity acquittee were to demonstrate either that he is no longer insane at all, or that although he remains in some degree mentally ill, he is no longer dangerous to himself or others. See note 1, supra.

Decisions of the District of Columbia Circuit regarding the standards for release from commitment under Sections 301(e) and 301(g) (see note 1, supra) are in some disarray. Compare Dixon v. Jacobs, 138 U.S. App. D.C. 319, 325, 427 F.2d 589, 595 (1970), with 138 U.S. App. D.C. at 331-333, 427 F.2d at 601-603 (Leventhal, J., concurring), and United States v. Ecker, supra, 177 U.S. App. D.C. at 47-52, 543 F.2d at 194-199. Insofar as these decisions suggest that the standard for commitment under Section 301(d) differs from that applied in civil commitments, they reflect an interpretation of D.C. Code 24-301(d) which must be treated as nonauthorative in the face of the District of Columbia Court of Appeals' conclusion that the standards for commitment are "identical." See M.A.P. v. Ryan, 285 A.2d 310, 311-312 (D.C. App. 1971).

In any event, petitioner has not claimed that the standard for commitment was improperly applied in his case, nor has he appealed from the denial of his application for release under Section 301(k). See note 5, supra. Accordingly, petitioner's claim that his commitment does not rest upon determinations equivalent to those made in civil commitment proceedings is unfounded.

(Pet. 7), his continued commitment rests upon a determination that he is presently dangerously mentally ill. 16/

In fixing the constitutionally acceptable level of proof for ordinary civil commitment proceedings in Addington, the Court balanced the individual's interest in minimizing the risk of an unwarranted commitment against "the state's interest in committing the emotionally disturbed under a particular standard of proof." 441 U.S. at 425; see Parham v. J.R., 442 U.S. 584, 599-600 (1979). The special position of one who has successfully pleaded the insanity defense to a criminal charge necessarily affects the balance to be struck. The government's interest in confining such persons for treatment and for the protection of society is unmistakable. 17/ Such persons have been found, beyond a reasonable doubt, to have committed an act that Congress has determined (by enactment of a criminal statute) to

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16/ Petitioner seemingly disregards the 50-day release hearing entirely in his due process argument. However, it is only petitioner's initial commitment for evaluation which rests solely upon the acquittal by reason of insanity. Such commitment for a reasonable evaluation period has been uniformly upheld. See, e.g., Ragsdale v. Overholser, supra, 108 U.S. App. D.C. at 313, 281 F.2d at 948; Bolton v. Harris, supra, 130 U.S. App. D.C. at 10, 395 F.2d at 651; In re Franklin, 7 Cal. 3d 126, 496 P.2d 465, 101 Cal. Rptr. 553 (1972); People v. Chavez, 629 P.2d 1040, 1046-1050 (Colo. 1981); People v. McQuillan, 392 Mich. 511, 525-529, 221 N.W. 2d 569, 575-577 (1974). Petitioner apparently did not challenge the validity of his initial commitment in the court of appeals. See notes 6, 7 and 13, supra. Nor has petitioner expressly challenged the initial commitment for evaluation in the petition. In any event, the government clearly has a compelling interest in confining persons, found to be dangerously insane by the trier of fact in a criminal trial, for a brief period of evaluation. See McNeil v. Director, Patuxent Institution, 407 U.S. 245, 249-250 (1972). Although those findings, strictly speaking, relate to a time in the recent past, they provide a reasonable basis for holding the insanity acquittee for observation needed to determine whether the acquittee remains dangerous and insane.

17/ A statutory right to treatment conferred by D.C. Code 21-562 has been extended to insanity acquittees by judicial decision. See Tribby v. Cameron, 126 U.S. App. D.C. 327, 379 F.2d 104 (1967); House v. Cameron, 125 U.S. App. D.C. 366, 373 F.2d 451 (1966).

be dangerous to society. 18/ This affirmative finding of the commission of a dangerous act resulting from mental illness differs from the often unavoidably speculative findings in civil commitment proceedings that the individual is dangerous to himself or to others. Compare Addington v. Texas, supra, 441 U.S. at 426-427; see In re Franklin, 7 Cal. 3d 126, 137, 496 P.2d 465, 471, 101 Cal. Rptr. 553, 559 (1972); Chase v. Kearns, 278 A.2d 132, 134-135 (Me. 1971). Note, Stopping the Revolving Door: Adopting a Rational System for the Insanity Defense, 8 Hofstra L. Rev. 973, 1015-1016 (1980). In addition to the

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18/ Petitioner's contention (Pet. 8), that the particular crime with which he was charged, petty larceny, does not "demonstrate the sort of dangerousness which can justify an indeterminate commitment under the District of Columbia's civil commitment statute," is misconceived. First, petitioner "confuse[s] danger with violence." Overholser v. O'Beirne, 112 U.S. App. D.C. 267, 276, 302 F.2d 852, 861 (1962). Petitioner does not question Congress's power to punish petit larceny--here shoplifting--by the criminal sanction. Accordingly, there is no room to question Congress's judgment that D.C. Code 24-301(d) should apply irrespective of the offense charged. As the District of Columbia Circuit has explained:

> Larceny is usually less violent than murder or assault, but in terms of public policy the purpose of the statute is the same as to both. Larceny, assault and murder are all dangerous; they are simply different areas of prohibited conduct. Hence unless we are to ignore the objectives and policies of the statute in question, the release provisions must apply in the same way and with the same force to larceny without violence as to a crime of violence until Congress speaks otherwise. [Overholser v. O'Beirne, supra, 112 U.S. App. D.C. at 276, 302 F.2d at 861.]

Moreover, petitioner's continuing commitment does not rest solely upon the fact that he performed a dangerous criminal act. Rather, the commitment rests upon petitioner's failure to show that he was no longer dangerously mentally ill. D.C. Code 24-301(d)(2). See notes 15 and 16, supra. There is accordingly no merit to petitioner's contention that his continuing commitment rests upon an inadequate foundation with regard to his dangerous propensities.

special indicia of dangerousness present, persons such as petitioner have, of course, been affirmatively found, by a preponderance of the evidence, to have been mentally ill at the time of the criminal act.

These circumstances may properly be considered in determining the nature and timing of additional process due the insanity acquittee. 19/ The risk that an insanity acquittee will be erroneously held as dangerously insane after the release hearing mandated by Section 301(d)(2) is substantially reduced by the prior determinations of insanity and dangerousness. Due process accordingly does not require that a burden of proving continued dangerous mental illness by clear and convincing evidence be placed upon the government in the release hearing. The fact that petitioner's insanity was permitted to be established by a preponderance of the evidence at his trial is, as the court of appeals noted (Pet. App. C 21), for his benefit. 20/ But once the acquittee has been permitted to establish his mental illness and its connection to his demonstrated dangerousness

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19/ As the Court noted in Lynch v. Overholser, supra, 369 U.S. at 715, in distinguishing such persons from those who have not sought to avoid criminal responsibility by a plea of insanity:

> The criminal defendant who chooses to claim that he was mentally irresponsible when his offense was committed is in quite a different position. * * * Congress might have thought * * that having claimed insanity to avoid punishment, the accused should then bear the burden of proving that he is no longer subject to the same mental abnormality which produced his criminal acts.

20/ A higher burden of proof of insanity could be placed upon defendants, consistent with due process. Leland v. Oregon, 343 U.S. 791 (1952); Rivera v. Delaware, 429 U.S. 877 (1976) (dismissal for want of a substantial federal question); see Patterson v. New York, 432 U.S. 197, 205 (1977).

by a preponderance of the evidence, the government has a compelling interest in assigning to the acquittee the burden of proving, to a similar degree of certainty, that these conditions no longer obtain. To impose upon the government a higher burden to prove that these conditions remain operative following the acquittal would reopen the "revolving door" by which persons proven both dangerous and mentally ill escape both punishment and treatment. See note 11, supra. Accordingly, the balancing analysis employed in Addington v. Texas, supra, does not support petitioner's contention that he has been denied due process. On the contrary, a substantial public interest justifies the procedure by which the continuing necessity for petitioner's commitment was determined.

2. Relying upon Baxstrom v. Herold, 383 U.S. 107 (1966), petitioner contends (Pet. 9-12) that his commitment cannot, consistent with equal protection, extend beyond the term of imprisonment he could have received if he had been convicted of the crime charged. Petitioner does not rest his argument upon the court of appeals panel's conclusion (see Pet. App. B 13)--rejected by the en banc court--that the commitment under Section 301(d) serves a "partially punitive" purpose whose force expires at the end of a hypothetical maximum sentence (see Pet. 12). 21/

21/ That conclusion, shared by two members of the court of appeals' panel and by the dissenting judges on rehearing en banc, is untenable. A disability imposed by the government is not punishment if it is "an incident of some other legitimate government purpose"--if "an alternative purpose to which [the disability] may rationally be connected is assignable for it, and [the disability is not] excessive in relation to the alternative purpose assigned [to it]." Bell v. Wolfish, 441 U.S. 520, 538 (1979), quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169 (1963). The non-punitive purpose of commitment under Section 301(d) is clear from its legislative history. As the District of Columbia Circuit stated in Hough v. United States, 106 U.S. App. D.C. 192, 195, 271 F.2d 458, 461 (1959): "[T]he basic policy underlying the statute * * * as we read the legislative history, (Continued)

Rather, petitioner asserts (ibid.) that, whatever the purpose of his confinement, considerations of equal protection require that he be recommitted by de novo civil proceedings if he is to be held once his hypothetical maximum sentence has expired.

a. Petitioner's reliance upon Baxstrom v. Herold is misplaced. In Baxstrom the petitioner was convicted of a criminal offense and sentenced to a term of imprisonment. During that term he was "certified" to be insane by a prison physician and was transferred to a forensic hospital operated by the state prison authority. No hearing or adversary process of any kind was afforded him. Compare Vitek v. Jones, 445 U.S. 480 (1980). Shortly before his sentence expired a hearing was held at which a judge determined that Baxstrom "may require mental care and treatment." See 383 U.S. at 109. On the basis of this finding Baxstrom remained committed to the forensic hospital beyond the expiration date of his sentence. This Court held that Baxstrom had been denied equal protection by his civil commitment at the end of his sentence without the opportunity for a jury

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is to provide treatment and cure for the individual in a manner which affords reasonable assurance for the public safety * * *." Such confinement is "not for punishment since the very purpose of providing such a verdict [of not guilty by reason of insanity is] to excuse the act and relieve the actor from penalties." Overholser v. O'Beirne, supra, 112 U.S. App. D.C. at 268, 302 F.2d at 853; accord, United States v. Ecker, 156 U.S. App. D.C. 223, 228, 479 F.2d 1206, 1211 (D.C. Cir. 1973); Collins v. Cameron, 126 U.S. App. D.C. 306, 308, 377 F.2d 945, 947 (D.C. Cir. 1967); Ragsdale v. Overholser, 108 U.S. App. D.C. 308, 312, 281 F.2d 943, 947 (1960); Hough v. United States, supra, 106 U.S. App. D.C. at 196, 271 F.2d at 462.

As the court of appeals recognized (Pet. App. C 11), the fact that commitment under Section 301(d) is partly predicated on the commission of a crime does not make it penal. Persons who have manifested dangerousness by committing criminal acts as a result of mental illness are not hospitalized because they need punishment, but because of the heightened risk they present of repetition of such acts, unless they are treated. Thus, as the court of appeals stated, "There is no evidence that the District of Columbia statutory scheme for commitment of insane criminals is anything but a regulatory, prophylatic statute, based on a legitimate governmental interest in protecting society and rehabilitating mental patients" (Pet. App. C 11).

determination of the need for commitment, afforded to all others civilly committed under state law. 383 U.S. at 110-112. The Court held further that Baxstrom was denied equal protection by his commitment to a forensic institution (rather than a mental hospital operated by civil authorities) without a judicial determination, such as is afforded to ordinary civil committees being considered for such treatment, that he was so dangerously mentally ill as to require confinement in such an institution. 383 U.S. at 110, 112-115. Baxstrom, in the Court's view, was indistinguishable from a non-criminal facing civil commitment, since neither person has been provided any prior opportunity for a jury determination of mental illness. 383 U.S. at 111-112.

The Baxstrom Court recognized, however, that "[e]qual protection does not require that all persons be dealt with identically," holding only that "it does require that a distinction made have some relevance to the purpose for which the classification is made." 383 U.S. at 111 (citation omitted). That test is satisfied here. The provisions of D.C. Code 24-301(d) applied to petitioner are tellingly different from the procedures applied to Baxstrom. And petitioner's status is different in key respects from Baxstrom's (or from that of a civil committee). Most significantly, unlike Baxstrom, petitioner was determined to be dangerously insane by the court in adversary proceedings. A jury trial was available to petitioner, 22/ and petitioner had the right to be and was represented by counsel in this proceeding, unlike Baxstrom. See 383 U.S. at 109 n.1. Moreover, at the close of the statutory period of evaluation following his insanity acquittal, petitioner was afforded a hearing to determine the need for continued

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22/ Had petitioner exercised that right, the jury would have been instructed as to the consequences of an acquittal by reason of insanity, unless petitioner requested that the instruction be omitted. See United States v. Brawner, supra, 153 U.S. App. D.C. at 41-42, 471 F.2d at 1009-1010.

confinement. Again he was represented by counsel, a right guaranteed by the statute. D.C. Code 24-301(d)(2).

Petitioner was not afforded a jury trial, such as is available to civil committees, at this second juncture. That procedural difference, however, is justifiable, as the court of appeals held (Pet. App. C 17-19), because of the earlier opportunity for a jury determination respecting petitioner's sanity at the time of his crime. 23/ As the court of appeals explained (Pet. App. C 20-22), other differences between the two procedures are also justified by substantial state interests, intimately related to the special status of an insanity acquittee. Once an individual has been determined to be dangerously insane, it is reasonable to place upon him the burden of proving that he has recovered, especially where that burden is commensurate with the burden previously borne of establishing that his insanity caused him to commit a criminal act. 24/ Thus, unlike Baxstrom, petitioner has been afforded the protection of procedures that are the equivalent of those afforded to civil committees, for the purpose of determining the relevant fact--i.e., whether or not he is dangerously mentally ill.

b. Other decisions of this Court cited by petitioner (Pet. 3) do not support his contentions. Jackson v. Indiana, 406 U.S.

23/ Petitioner nowhere addresses the court of appeals' detailed analysis of this and the other procedural differences between the civil commitment process and the procedures prescribed by Section 301(d), or the court's discussion of the circumstances that justify them, merely arguing conclusorily that those differences are "crucial" (Pet. 11).

24/ Petitioner simply ignores the prior determination of insanity in his equal protection argument, which focuses on the release hearing viewed in isolation (see Pet. 11). Curiously, petitioner ignores the release hearing in his due process argument. See note 16, supra. Indeed, the fundamental flaw in petitioner's argument is the failure to view the Section 301 procedures as an integrated whole.

715 (1972), proscribes indefinite commitment of one charged with a criminal offense but found incompetent to stand trial. The Court found a denial of equal protection in the indefinite detention of a defendant resting on application of different standards from those applied to civil commitments (inability to participate in legal proceedings as contrasted to dangerousness). 406 U.S. at 723-730. Here, however, the standard applied to petitioner is identical to that applied to civil committees--continued commitment rests on a finding of mental illness and dangerousness for both types of committees. See note 15, supra. Jackson also found a denial of due process in a commitment, premised solely upon the pendency of criminal charges, of an individual unable to attain competency for trial. 406 U.S. at 738. The Court did not question the state's power to commit such a person upon a showing of dangerous mental illness--noting only that Indiana had not detained Jackson on that basis. 406 U.S. at 737. Here, unlike Jackson, 406 U.S. at 738, the "nature and duration of commitment bear[s] some reasonable relationship to the purpose for which the individual is committed."

McNeil v. Director of Patuxent Institution, 407 U.S. 245 (1972), and Specht v. Patterson, 386 U.S. 605 (1967), are also inapposite here. In Specht, the defendant was convicted of a sexual offense but, in lieu of an ordinary term, was "sentenced" to an indeterminate term of confinement under a separate procedure applicable to sex offenders. No opportunity for a hearing at which defendant might present evidence or confront adverse witnesses with respect to the need for such confinement was allowed. The Court found a denial of due process because punishment was imposed, in a proceeding separate from the criminal trial, based upon a finding of fact as to the defendant's dangerous propensities which he had not been allowed to litigate. 386 U.S. at 608-610. Here, by contrast, petitioner was afforded a full and fair hearing on the questions on which

his commitment turned. In McNeil, supra, the defendant was sentenced to a fixed term upon conviction of a crime and was referred for evaluation of his mental and emotional health on the basis of an ex parte judicial determination. The Court concluded that the defendant could not be held for evaluation beyond the end of his five-year sentence, as there had been no judicial determination that confinement beyond that time was warranted. Here, of course, petitioner's confinement rests upon the judicial determination that he presently remains dangerously mentally ill.

Finally, the court of appeals properly distinguished (Pet. App. C 22) Humphrey v. Cady, 405 U.S. 504 (1972). There the defendant had been convicted of a crime and committed to a sex deviate facility in the state prison in lieu of sentence. Under the Wisconsin statute at issue, such a commitment ran for the duration of the sentence, but could be renewed for an unlimited number of five-year terms upon a finding of need for continued treatment at the conclusion of the preceding term. The prisoner challenged his continuing commitment under this statute by petition for a writ of habeas corpus. This Court's holding was only that his claims were substantial enough to warrant a hearing. 405 U.S. at 508. The prisoner argued that, as a matter of equal protection, he was entitled to a jury trial, such as was provided to civil committees, at least at the hearing held to determine whether his commitment should be renewed. The state suggested that the difference was justified by the fact that the commitment was merely an alternative form of sentencing. In concluding that the prisoner's contention was not so insubstantial as to justify the district court's dismissal of the

prisoner's petition, the Court remarked that the justification proffered by the state

> arguably has force with respect to an initial commitment * * * which is imposed in lieu of sentence, and is limited in duration to the maximum permissible sentence. The argument can carry little weight, however with respect to the subsequent renewal proceedings, which result in five-year commitment orders based on new findings of fact, and are in no way limited by the nature of the defendant's crime or the maximum sentence authorized for that crime. [405 U.S. at 510-511; footnote omitted.]

These comments do not support petitioner's contention that his commitment must terminate with the expiration of his sentence, for petitioner's confinement does not rest upon conviction of a crime, nor is his commitment a sentencing alternative. Rather, petitioner's initial commitment was triggered by an acquittal which embodied a finding of dangerous insanity--the very facts which support civil commitments. Thus, unlike Humphrey, petitioner has had an opportunity for jury review of these key questions. The omission of an opportunity for a jury trial at the 50-day release hearing is accordingly permissible.

c. Petitioner's errs in asserting (Pet. 3) that the decision below conflicts with several decisions of the District of Columbia Circuit. In Bolton v. Harris, 130 U.S. App. D.C. 1, 395 F.2d 642 (1968), the D.C. Circuit engrafted the requirement of a hearing to determine continuing insanity upon Section 301(d), which, at the time, had no such provision. See note 11, supra. The Court further held that "persons found not guilty by reason of insanity must be given a judicial hearing with procedures substantially similar to those in civil commitment proceedings"--including "[w]here feasible * * * notice, counsel, jury trial etc. * * *." 130 U.S. App. D.C. at 10 and note 50, 395 F.2d at 651 and note 50. However, in Bolton, the acquittee

seeking release had been committed automatically following his acquittal by reason of insanity under the standard applied prior to 1970 in the District of Columbia. That standard required acquittal whenever there was a reasonable doubt as to a defendant's sanity. See note 11, supra. Bolton turns essentially upon the fact that, absent a post-acquittal hearing, there would be no affirmative determination of mental illness. 130 U.S. App. D.C. at 9, 395 F.2d at 650. Bolton is doubly inapposite to the present Section 301(d), which provides such a hearing and which is applicable only after an affirmative jury or jury-waived finding of insanity. 26/ While the 1970 amendments to Section 301(d) (see note 11, supra) do not track the procedure promulgated by the D.C. Circuit in every detail, that court has repeatedly declined to intimate any view as to whether any constitutional defect remains. See United States v. Brawner, 153 U.S. App. D.C. 1, 30 n.51, 471 F.2d 969, 998 n.51 (1972) (en banc); United States v. Wright, 167 U.S. App. D.C. 309, 311 n.9, 511 F.2d 1311, 1313 n.9 (1975); United States v. Jackson, 179 U.S. App. D.C. 375, 382 n.13, 553 F.2d 109, 116 n.13 (1976); United States v. Henry, 195 U.S. App. D.C. 110, 111-112 & note 7, 600 F.2d 924, 925-926 & note 7 (1979). 27/

26/ In Bolton the D.C. Circuit purported merely to interpret Section 301(d) by engrafting the hearing requirement. 130 U.S. App. D.C. at 11, 395 F.2d at 652. Of course, to the extent that the decisions of the D.C. Circuit relied upon by petitioner rest upon an interpretation of local law, the decision of the local court of appeals must be deemed controlling, rather than conflicting, see M.A.P. v. Ryan, 285 A.2d 310, 311-312 (D.C. App. 1971), especially inasmuch as the decision below was rendered by the en banc court, id. at 312.

27/ Several provisions of the 1970 District of Columbia Court Reform and Criminal Procedure Act (see note 11, supra) reduced the number of occasions that thereafter arose for the D.C. Circuit to pass upon the interpretation or constitutionality of Section 301(d). First, the Act expanded the criminal jurisdiction of the District of Columbia courts to encompass all (Continued)

Petitioner's reliance upon Waite v. Jacobs, 154 U.S. App. D.C. 281, 475 F.2d 392 (1973), and United States v. Brown, 155 U.S. App. D.C. 402, 478 F.2d 606 (1973), is similarly misplaced. In both cases the court considered commitments resulting from insanity acquittals under the reasonable doubt standard in effect prior to the 1970 changes in the operation of the insanity defense in the District of Columbia (see note 11, supra). In Waite the court suggested, in dictum, that considerations of equal protection might compel the government to release an insanity acquittee, committed solely on the basis of a reasonable doubt as to sanity, whose maximum hypothetical sentence had expired, unless the patient was recommitted in a fresh civil proceeding. The suggestion rested upon the fact that, under the pre-1970 insanity defense and the terms of Section 301(d) prior to 1970, an insanity acquittee had never been affirmatively determined to be mentally ill, and the fact that Bolton was not applied retroactively to provide hearings to insanity acquittees committed prior to the date of that decision. See Waite v. Jacobs, supra, 154 U.S. App. D.C. at 287-289, 475 F.2d at 398-400; Bolton v. Harris, supra, 130 U.S. App.

violations of the D.C. Code and eliminated federal district court jurisdiction of major offenses under the D.C. Code. Second, the appellate jurisdiction of the D.C. Circuit over cases in the D.C. Court of Appeals was abolished. See H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 23, 30-35 (1970); M.A.P. v. Ryan, supra, 285 A.2d at 311-312. Finally, Section 301 was amended to create a statutory proceeding (Section 301(k)) by which release may be sought in the committing court. Exhaustion of this remedy is a prerequisite to consideration of any petition for habeas corpus. D.C. Code Section 24-301(k)(7). This provision has diverted such cases from the D.C. Circuit. See Johnson v. Robinson, 166 U.S. App. D.C. 62, 509 F.2d 395 (1974).

D.C. at 12-13, 395 F.2d at 653-654. The intervening statutory changes render the Waite dictum inapposite here. Indeed, the court declined to express any view as to "whether the considerations we have adverted to apply to post-Bolton acquittees whose maximum sentence periods have expired." 154 U.S. App. D.C. at 390 n.18, 475 F.2d at 401 n.18.

United States v. Brown, supra, again involved an individual acquitted, prior to the effective date of the 1970 amendments to Section 301, on the basis of a reasonable doubt as to his sanity. The decision in Bolton had, by that time, been rendered, and the acquittee was accordingly afforded a "Bolton hearing" to determine his present insanity and dangerousness. At that hearing a jury determined, by a preponderance of the evidence, that the standard for commitment was met. In Brown the D.C. Circuit rejected acquittee's contention that the government was required to establish dangerous mental illness by proof beyond a reasonable doubt. Prefiguring Addington v. Texas, supra, the court suggested that proof by clear and convincing evidence (but not more) might be required in civil commitments, but held that use of a preponderance of the evidence standard under Section 301(d) was consistent with equal protection. 155 U.S. App. D.C. at 404-407, 478 F.2d at 608-611. 28/ Although the court noted its view that denial of a jury trial would not be justifiable, 155 U.S. App. D.C. at 407, 478 F.2d at 611, that dictum has no application to commitments such as petitioner's, which rest, in part, on a finding of dangerous insanity in a criminal trial in which a jury was available. Indeed, the court again declined to consider the effect of the 1970 amendments to Section 301. 155

28/ The court declined to intimate any view upon the constitutional adequacy of a procedure used by California substantially similar to that established by the present D.C. Code 24-301. See 155 U.S. App. D.C. at 407 n.11, 478 F.2d at 611 n.11.

U.S. App. D.C. at 404 n.3; 478 F.2d at 608 n.3. Brown also repeats, in dictum, the suggestion that at some point, such as the expiration of the hypothetical maximum sentence an acquittee could have received if convicted, continued commitment must rest upon recommitment in fresh civil proceedings. 155 U.S. App. D.C. at 408, 478 F.2d at 612. The present case is to be distinguished in this respect, however, for unlike Brown, petitioner was committed, in part, upon an affirmative finding of insanity by the trier of fact in his criminal trial. Moreover, as is indicated above, the D.C. Circuit has repeatedly declined to pass upon the constitutionality of Section 301(d) in its present form. There is accordingly no conflict of decisions warranting review by this Court at this time.

d. Once the presence of dangerous mental illness has been established by procedures that comport with due process and are reasonably adjusted to the unique situation of an insanity acquittee, the only remaining question is whether the procedures by which the continuing need for a commitment of an insanity acquittee is determined are constitutionally adequate. No equal protection claim can be fashioned on that score, however, for both the standard for release (proof that the patient is no longer dangerously mentally ill) and the burden of proof (upon the patient seeking release, by a preponderance of the evidence) appear to be identical. See notes 1, 4 and 15, supra; cf. O'Connor v. Donaldson, 422 U.S. 563, 573 (1975). In any event, no equal protection challenge to the release procedures applicable to petitioner has been raised in this Court, and none was raised below (see Pet. App. C 5 and 17 n.19). See also note 15, supra.

The expiration of the maximum sentence that petitioner could have received if convicted is, as the court of appeals held (Pet. App. C 8-9), simply irrelevant to the permissible duration of petitioner's commitment, for unlike petitioners in Specht, Humphrey and McNeil, petitioner's confinement does not rest upon such a conviction. Rather, his commitment rests upon the finding of fact--reached by an appropriate procedure--that he is dangerously mentally ill. The validity of that finding, twice made at the outset of his confinement, and reviewable at regular intervals upon petitioner's application, does not somehow decay over time in a manner not applicable to civil committees. Nor is that finding dissipated by the expiration of the maximum sentence petitioner could have received. There is accordingly no warrant for requiring the government to bear the burden of proving continued dangerous insanity by recommitting insanity acquittees after the passage of a certain amount of time--a right not afforded civil committees. To do so might raise equal protection questions more substantial than those suggested by petitioner.

Petitioner's argument takes no account of the unique position of insanity acquittees. He assumes that he must be treated in all respects as a convicted criminal or in all respects as a civil committee, when in fact he is neither. The District of Columbia procedure for commitment of insanity acquittees provides a procedurally sound means of determining whether the standard for commitment has been met. The differences between these procedures and those prescribed for civil committees are carefully designed to reflect the special position of an insanity acquittee, who has been permitted to escape the penal sanction on the basis of his showing by a preponderance of the evidence that he was afflicted with a dangerous mental illness. Equal protection requires no more. See Parham v. J.R., supra, 442 U.S. at 599-600.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1981

Supreme Court, U.S.
FILED
APR 6 1982
ALEXANDER L. STEVAS
CLERK

No. 81-5195

In the Supreme Court of the United States

OCTOBER TERM, 1981

MICHAEL JONES,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

JOINT APPENDIX

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SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA

Docket No.: 73450-75

UNITED STATES

v.

MICHAEL A. JONES

The following is a chronological listing of all court proceedings.

DATE	ENTRIES	JUDGE
1975		
Sept. 20	Plea: Not Guilty—Continued to December 2, 1975 Surety Bond: $1,000.	
	C 9-22-75 for Forensic Exam as to competency. Come up to be issued. Committed	Washington
Sept. 22	Report from Forensic received and filed herein. ec	Washington
	Letter received. The Court orders defendant committed to St. Elizabeth's Hospital for mental examination and report. Cont'd to November 25, 1975. Competency and productivity. Committed	Pryor
Nov. 25	Janice R. Hunt, Official Court Reporter. Counsel never appeared. Report not ready. Case continued to January 6. 1976 for competency hearing. Defendant to be returned to Saint E's.	Draper

DATE	ENTRIES	JUDGE
1976		
Jan. 6	Katherine Reynolds, Official Court Reporter. No parties present. Case continued to March 2, 1976 for hearing and report. Committed	Hannon
Mar. 2	Report from St. E's Hospital received and filed. Forwarded to Judge Moore. ec	
Mar. 2	Defendant and Attorney present. Competency hearing held. No objection by counsel to the report of competency. The court finds the defendant competent and defendant is so adjudged or ajudicated. Case continued to March 8, 1976 for non-jury trial in Courtroom #15. Bond set $300 surety.	
Mar. 2	Vacate above entry as to bond only. Defendant held w/o bond pending trial. Defendant to be committed to Correctional Center to be placed in half-way house.	Moore
Mar. 8	Defendant to assignment commission. Time to Assignment commission *1022* Time to Trial Judge Time Trial Judge received	Ugast
Mar. 8	Assigned to Judge Stewart. 10:25 rb	Moore
Mar. 8	Darlene M. Leasure, Official Court Reporter. Defendant not brought up. Case certified back to #15 for continuance. 11:28 a.m.	Stewart

DATE	ENTRIES	JUDGE
1976		
Mar. 8	Continued to March 9, 1976 before M.O. judge for NGI plea.	Ugast
Mar. 9	Counsel present. Case continued to 3-1-76, Vivian A. Principato, Official Court Reporter. Before J. Moore for N.G.I. plea	Moore
Mar. 10	Counsel present case continued to 3-12-76 for M.O. (N.G.I. plea) before J. Moore. Committed	Moore
Mar. 12	Defendant and Attorney present. Vivian A. Principato Official Court Reporter. Trial by the Court commenced at 3:00 p.m. Government presents statement of facts. Stipulate to by defense. Testimony taken by Dr. David Shapiro. Judgment by the Court of not guilty by reason of insanity. Case continued before the mental competency judge for a bolton hearing on April 27, 1976. Defendant remanded into the custody of the United States Marshal	Moore
Apr. 27	Report received and filed herein. jc.	
Apr. 27	Pearl D. Stucky, Official Court Reporter. Case continued to May 4, 1976 for Hearing. Attorney Shellair contacted late in the afternoon and not prepared. Defendant to return to St. E's	Smith
May 3	Case continued until May 25, 1976 at 10:00. Doctor unable to be present at hearing	Campbell

DATE	ENTRIES	JUDGE
1976		
May 25	Hearing having further continued until 11-29-76. Parties Present	Washington
Nov. 26	Patricia Y. Sanborn, Official Court Reporter. Accused present Continued to January 18, 1977 for M.O. Hearing to consider civil committment. The U.S. Atty's office has until January 21, 1977 to show with the previous order should not be set aside. Accused to return to St. E's Hospital.	Hamilton
Nov. 30	Order signed by Judge Hamilton received and filed herein.	
1977		
Jan. 17	Motion to modify Order from AUSA received and filed herein ec	
Jan. 18	Katherine Reynolds, Official Court Reporter. Governments Motion to modify order granted. Defense to file response within 10 days of this date, government to response opposition February 8, 1977 Accused to return to St. E's Hospital.	Hamilton
Jan. 18	Respondent's opposition to Government Motion to Modify Order received and filed herein	
Jan. 17	Motion to modify Order received and filed this day.	Hamilton

DATE	ENTRIES	JUDGE
1977		
Jan. 24	Entry of 18 Jan. '77 hereby vacated Government's motion to modify Order of November 30, 1976 is hereby GRANTED as of January 18, 1977. See Order herein.	Hamilton
Jan. 26	Respondent's Motion for reconsideration and for immediate release of respondent from further commitment at Saint Elizabeth's Hospital received and filed. Forwarded to Judge Jamilton. ec	
Feb. 2	Respondent's motion for reconsideration and for immediate release of respondent from further committment at St. E's Hospital, reviewed and denied.	Hamilton
Feb. 24	Motion for release from Saint Elizabeth's Hospital. ec	
Feb. 24	Memorandum of points and Authorities in Support of Petitioner's Motion for Release from Saint Elizabeth's Hospital. ec	
Feb. 28	Notice of Appeal received and filed forwarded to Mr. McRae's office. ec	

RELEVANT DOCKET ENTRIES IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

In Case. No. 11918

MICHAEL A. JONES, APPELLANT

v.

UNITED STATES, APPELLEE

DATE	FILINGS-PROCEEDINGS
6/14/77	Motion of Appellant for summary reversal (m-14)
6/23/77	Opposition of appellee to motion for summary reversal (m-23)
6/30/77	Reply of appellant to opposition to motion for summary reversal (m-30)
7/7/77	Motion of appellee for summary affirmance (m-7)
7/13/77	Opposition of appellant to motion for summary affirmance (m-13)
11/11/77	ORDER denying the motions of summary reversal and summary affirmance and the case shall be expedited for oral argument (Judges Mack and Ferren)
12/5/77	ARGUED before Judges Kelly, Mack and Ferren
12/5/77	ORDER directing counsel for appellee to file a post hearing brief within 10 days from this order and appellant's shall file a response with 7 days of service (Judges Kelly, Mack and Ferren)
12/21/77	Motion of appellee to file brief (m-21) GRANTED (COG) 12/29/77
12/29/77	Appellee's Brief. (m-21)
1/5/77	Appellant's brief (m-5)
11/28/78	OPINION per Associate Judge John M. Ferren. Judgment sustaining the order on appeal subject to appellant's right to periodic review. (p. 3224)
1/2/79	Appellant's petition for rehearing and rehearing en banc (m-12/26)

DATE	FILINGS-PROCEEDINGS
2/26/79	Appellee's opposition to petition for rehearing or rehearing en banc (m-26)
5/20/79	ORDER scheduling rehearing before the division on April 16, 1979 at 1:30 p.m. (Judges Kelly, Mack and Ferren
4/16/79	ARGUED before Judges Kelly, Mack and Ferren
2/4/80	OPINION per Associate Judge John M. Ferren. Concurring opinion by Judge Mack; dissenting opinion by Judge Kelly. (p. 170) Order vacating the opinion and judgment of 11/28/78, and the government shall have 30 days to initiate civil commitment proceeding from the issuance of mandate, etc.
3/11/80	Appellee's petition for rehearing en banc (m-10) sl
4/22/80	ORDER granting appellee's petition for rehearing en banc; vacating the 2/4/80 opinions and order heretofore entered; Clerk of Superior Court to return mandate; Clerk to schedule oral argument before en banc court as soon as business permits; counsel directed to file nine additional copies of briefs heretofore filed by Monday 5/12/80 (Newman, Kelly, Kern, Gallagher, Nebeker, Harris, Mack, Ferren, Pryor) cmj
9/8/80	ARGUED before Judges Newman, Kelly, Kern, Gallagher, Nebeker, Harris, Mack, Ferren and Pryor. mj
5/29/81	OPINION for the Court by Associate Judge Catherine B. Kelly. (p. 1177) Dissenting opinion by Associate Judge John M. Ferren, with whom Chief Judge Newman and Associate Judge Mack join. (p. 1201) JUDGMENT affirming trial court's order denying appellant's right to immediate release or, in the alternative, civil commitment pursuant to D.C. Code 1973, § 21-545(b). mj
1/13/81	Order of Supreme Ct granting pet for cert in f.p. on 1-11-82 (#81-5195)

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 11918

MICHAEL A. JONES, APPELLANT

v.

UNITED STATES, APPELLEE

Appeal from the Superior Court of the
District of Columbia

(Hon. Eugene N. Hamilton, Hearing Judge)

(Argued December 5, 1977 Decided November 28, 1978)

Before KELLY, MACK, and FERREN, *Associate Judge*.

FERREN, *Associate Judge*: The trial court found appellant Michael Jones not guilty of petit larceny by reason of insanity. After a "release hearing," D.C. Code 1973, § 24-301(d), the court committed Mr. Jones indefinitely to St. Elizabeths Hospital. This case presents one question: whether Michael Jones is constitutionally entitled to release from St. Elizabeths upon expiration of the maximum period for which he could have been imprisoned (in this case one year), unless the government carries the burden of proving, at a civil commitment hearing, D.C. Code 1973, § 21-545(b), that Mr. Jones is still mentally ill and dangerous to self or others.

Appellant does not challenge the validity of his initial commitment to St. Elizabeths after the "release hearing." On the assumption, therefore, that this commitment was lawful, we can perceive no constitutional requirement that appellant be released or civilly committed at the end of the maximum imprisonment period, for that period bears no relationship to the unchallenged basis for appellant's hospital confinement: that he is mentally ill, is dangerous to self or others, and should receive treatment until he is well enough for release. We therefore affirm

the denial of appellant's motion for civil commitment or release.

I.

On September 19, 1975, the police arrested Michael Jones for attempting to steal a coat from a department store. The next day the government charged him with attempted petit larceny; and, following a competency examination yielding a finding of mental illness, he was arraigned and ordered to St. Elizabeths for mental observation pursuant to D.C. Code 1973, § 24-301(a). He remained in the District of Columbia jail for four and one-half months until bed space became available at St. Elizabeths on February 4, 1976.

Following the observation period, appellant went to trial on stipulated facts. In an uncontested proceeding, the trial judge entered a judgment of not guilty by reason of insanity. Thereafter, he recommitted appellant to St. Elizabeths temporarily, pursuant to D.C. Code 1973, § 24-301(d)(1). On May 25, 1976, appellant was afforded his § 24-301(d)(2) "release hearing," at which the court determined that he was mentally ill and likely to be dangerous to himself or others in the reasonable future. The court accordingly continued his commitment to St. Elizabeths—indefinitely.

At this juncture the procedural history of the case becomes murky. Apparently, upon conclusion of the May 25 proceeding, the court ordered a further hearing for November 29, 1976. When that date arrived appellant's counsel appeared before Judge Hamilton and orally requested that appellant be released—or civilly committed—since his cumulative hospital confinement had exceeded the one-year maximum period of incarceration for attempted petit larceny. No attorney appeared for the government. The judge responded with an order that the government either pursue civil commitment or show cause why the "criminal commitment" should not be vacated by January 18, 1977.

During the seven-week period which followed, it appears that the government initiated the civil commitment process—resulting in a recommendation of such commitment by the staff of St. Elizabeths—and then changed course, deciding to contest the court's order. The government pursuaded the court to modify its order by requiring appellant to file a written motion for civil commitment or release, and by allowing the government time to respond.

The matter came on for hearing on February 22, 1977. After extended argument, the court denied appellant's motion and reaffirmed the findings of May 25, *i.e.*, that appellant was mentally ill and likely to be dangerous. Appellant noted an appeal and, on June 14, 1977, filed a motion in this court for summary reversal. The government responded with a motion for summary affirmance. The motions division of this court rejected both requests for summary disposition. Instead, we ordered expedited oral argument on the appeal. After argument before this division of the court, we called for post-argument briefs.

In his final brief, appellant confirms the narrow scope of the question presented in this appeal. "[A]ppellant's position has been, and remains, . . . that *even* if an automatic commitment following an insanity acquittal is *permissible*, continued confinement beyond a certain point of time—at the latest when the prison sentence which could have been imposed had the defendant been convicted has run—is constitutionally *impermissible* unless the government can prove the necessity of such continued confinement just as it would have to prove the necessity where it seeks civil commitment" (emphasis in original). Thus, we are not confronted with a challenge to the process for initial commitment which ordinarily follows an insanity acquittal. We are faced only with the constitutional propriety of hospitalization beyond the period of a maximum prison term, absent invocation of the protections of the civil commitment process.

II.

According to appellant, the principles of *Baxstrom v. Herold*, 383 U.S. 107 (1966), *Bolton* v. *Harris*, 130 U.S. App.D.C. 1, 395 F.2d 642 (1968), and, more directly, *Waite* v. *Jacobs*, 154 U.S.App.D.C. 281, 475 F.2d 392 (1973), mandate a conclusion that the equal protection clause is transgressed when insanity acquitees are held beyond their maximum potential terms of imprisonment without the intervention of civil commitment procedures.[1] To comprehend his argument fully, a brief history is in order.

Prior to the circuit court's 1968 *Bolton* decision, a successful insanity plea resulted in automatic, indeterminate confinement to a mental hospital. Because there was no required judicial review of such confinements, the "statutory scheme would [have] conceivably allow[ed] a patient committed under [D.C. Code 1967, § 24-301(d)] to remain in the hospital for the rest of his life without a judicial determination that he [was] mentally ill or that he [was] still likely to commit dangerous acts." *Bolton*, *supra* at 7, 395 F.2d at 648. At that time, however, as today, the 1964 Hospitalization of the Mentally Ill Act, D.C. Code 1973, §§ 21-541 to -545, provided numerous protections for civilly committed persons—including, significantly, the right to a jury trial with the burden on the government to prove mental illness and dangerousness beyond a reasonable doubt. In *Bolton*, therefore, the circuit court explored the "sharp contrast" between the two commitment schemes in light of the Supreme Court's *Baxstrom* principle "that the commission of criminal acts does not give rise to a presumption of dangerousness which, standing alone, justifies substantial difference in commitment procedures and confinement

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[1] The Fifth Amendment's due process clause includes an equal protection safeguard against federal and District of Columbia governmental actions. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); *Davis* v. *Washington*, 168 U.S.App.D.C. 42, 43 n.2, 512 F.2d 956, 957 n.2 (1975), *rev'd on other grounds*, 426 U.S. 229 (1976).

conditions for the mentally ill." *Bolton*, *supra* at 6, 395 F.2d at 647. Concluding that the differences between the two groups, insanity acquitees and civil commitees, could not constitutionally support most of the differences in procedure, the court read most of the 1964 Act's civil commitment safeguards into the "insane criminal" commitment scheme.[2] Thereafter, acquitees were entitled to a "*Bolton* hearing" after trial: "a judicial hearing with procedures substantially similar to those in civil commitment proceedings." *Id.* at 10, 395 F.2d at 651 (footnote omitted).

In 1970, however, Congress responded to the *Bolton* decision by amending § 24-301 of the D.C. Code. Dissatisfied with the anticipated consequences of *Bolton*, Congress attempted to accommodate the acquitee's constitutional rights and provide rehabilitative opportunities while protecting the public against anticipated danger. *United States* v. *Jackson*, 179 U.S.App.D.C. 375, 381, 553 F.2d 109, 115 (1976). By the terms of the amended, and currently applicable, § 24-301, an insanity acquitee once again faces automatic commitment:

> If any person tried upon an indictment or information for an offense raises the defense of insanity and is acquitted solely on the ground that he was insane at the time of its commission, he shall be committed to a hospital for the mentally ill until such time as he is eligible for release pursuant to this subsection or subsection (e). [D.C. Code 1973, § 24-301(d)(1).]

The next paragraph of the statute, however, eliminates the pre-*Bolton* possibility of indeterminate commitment without judicial review. Congress provided for an auto-

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[2] The court expressly permitted two distinctions to continue: (1) automatic, temporary commitment of acquitees and (2) mandatory court review of a hospital's release decision for acquitees. *Bolton*, *supra* at 10-11, 395 F.2d at 651-52.

matic, legislatively tailored "release hearing" within 50 days of the § 24-301(d)(1) commitment:

> A person confined pursuant to paragraph (1) shall have a hearing, unless waived, within 50 days of his confinement to determine whether he is entitled to release from custody. . . . If the hearing is not waived, the court shall cause notice of the hearing to be served upon the person, his counsel, and the prosecuting attorney and hold the hearing. Within ten days from the date the hearing was begun, the court shall determine the issues and make findings of fact and conclusions of law with respect thereto. [D.C. Code 1973, § 24-301(d)(2), in relevant part.]

Additionally, the 1970 amendments provided for habeas corpus relief, § 24-301(g), as well as for a more specific motion mechanism for seeking release (no more often than every six months), § 24-301(k).

As we have noted, however, the major impetus for legislative action was anxiety about the *Bolton* limitation on the ability to continue commitment of those who successfully interpose insanity defenses to criminal charges. Thus, for our purposes here, the most notable features of the 1970 amendments are not the new procedures afforded acquitees but the omitted or retracted guarantees which had been extended by the *Bolton* decision. It is the differences between the post-1970 "modified *Bolton*" scheme under which appellant was committed and has continued to be confined, D.C. Code 1973, § 24-301, and the current civil commitment processes, D.C. Code 1973, § 21-501 *et seq.*, which had been extended to acquitees by *Bolton*, that must be the focus of our equal protection analysis. These differences are substantial.

Civil commitees have "commitment hearings" at which the government bears the burden of proving "mental illness" and likelihood of injury to "himself or other persons" beyond a reasonable doubt. D.C. Code 1973, § 21-545(b); *In re Ballay*, 157 U.S.App.D.C. 59, 482 F.2d

648 (1973). In contrast, at a § 301(d)(2) "release hearing," the acquitee must carry the burden of demonstrating by a "preponderance of the evidence" that he "has recovered his sanity and will not in the reasonable future be dangerous to himself or others." D.C. Code 1973, §§ 24-301(d)(2), -301(e). The civil commitment process affords a jury, § 21-545; the acquitee "release hearing" process does not. *See* § 24-301. Release of a civil commitee does not require court supervision, § 21-546, whereas the court retains the last word for acquitees, § 24-301(e). The civil scheme furnishes regular six-month review initiated by the hospital, § 21-548, while the scheme for acquitees mandates review only upon a motion for relief, § 24-301(k), or petition for habeas corpus, § 24-301(g), initiated by the patient (while permitting review initiated by the hospital, § 24-301(e)).

Appellant maintains that even if the rationale for different commitment procedures is valid,[3] it must expire at a time no later than the end of the maximum prison term which could have resulted from criminal conviction. His claim, in effect, is that the running of the potential prison term activates *Baxstrom* and *Bolton* principles which entitle him, at that time, to additional safeguards. We therefore turn to the merits of appellant's claim.

III.

The United States Court of Appeals for the District of Columbia Circuit has given a measure of judicial

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[3] Although the issue has not been resolved, there has been much discussion concerning the propriety of the 1970 insanity commitment amendments and their vulnerability of a new *Bolton*-type challenge. *See Bethea* v. *United States*, D.C.App., 365 A.2d 64, 92 (1976), *cert. denied*, 433 U.S. 911 (1977); *United States* v. *Jackson*, *supra*; *United States* v. *Ecker*, 177 U.S.App.D.C. 31, 40-41, 543 F.2d 178, 187-88 (1976); *cert. denied*, 429 U.S. 1063 (1977); *United States* v. *Wright*, 167 U.S.App.D.C. 309, 311 n.9, 511 F.2d 1311, 1313 n.9 (1976); *Johnson* v. *Robinson*, 166 U.S.App.D.C. 62, 66, 509 F.2d 395, 399 (1977); *United States* v. *Brown*, 155 U.S.App. D.C. 402, 404 n.3, 478 F.2d 606, 608 n.3 (1973); *Dixon* v. *Jacobs*, 138 U.S.App.D.C. 319, 332-34, 427 F.2d 589, 602-04 (1970) (Leventhal, J., concurring and dissenting).

endorsement to appellant's theory in *Waite* v. *Jacobs*, *supra*. In *Waite*, a pre-*Bolton* acquitee who could not reap *Bolton's* prospective benefits, *Bolton*, *supra* at 12-13, 395 F.2d at 653-54, made essentially the same claim that appellant makes here. The circuit court found merit in this equal protection claim. The court observed that

> after the expiration of the period for which an acquittee might have been incarcerated had he been convicted, it may be irrational, within the meaning of equal protection doctrine, to distinguish between an acquittee and a commitee. Acquitees who have been confined for that period, therefore, may be entitled to treatment no different from that afforded commitees. [*Waite* v. *Jacobs*, *supra* at 284, 475 F.2d at 395.]

The court then stated the issue to be "whether appellant, in seeking release from confinement, is on an equal footing with a commitee," *id.* at 288, 475 F.2d at 399, or, as a matter of law, is situated differently from a commitee. Advertising to the radical differences in initial treatment (pre-*Bolton* v. civil commitment), the court perceived that pre-*Bolton* acquitees and commitees were not on equal footing; it then opined that equal protection might well be transgressed in a Waite's case, for "just as it is unconstitutional to place a burden on only one of two similarly situated persons [the traditionally accepted meaning of equal protection], *so also may it be irrational to place similar burdens on persons situated differently.*" *Id.* (emphasis added). The court concluded, "it would seem that [appellant] ha[d] a right to a hearing, with all the procedural safeguards available in civil commitment proceedings." *Id.* at 289, 475 F.2d at 400. Because, however, there was a possibility that Waite's commitment actually was attributable to a civil commitment which had preceded the criminal action, and because the court's novel equal protection analysis had not been briefed or argued, the court did not order specific relief;

instead, it remanded the case to the district court for further proceedings.

It is this novel, call it "equalization," theory of equal protection which appellant invokes here—a theory that equal treatment of the two groups, commitees and acquitees, eventually requires remedial, *i.e.*, compensating, procedures for acquitees because their initial commitments were more perfunctory. For several reasons, however, we have concluded that the *Waite* analysis is inapplicable to this case.[4]

In the first place, Waite's situation is factually distinguishable from that of appellant Jones. Waite, a pre-*Bolton* acquitee suffered from the "no judicial review" (save habeas corpus) system condemned in *Bolton*. He had been automatically, indefinitely committed as presently ill and dangerous because he successfully raised a mere reasonable doubt about his legal sanity at the time of committing the offense.[5] Because of the unfortunate circumstances of his pre-*Bolton* status, Waite

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[4] At least four subsequent circuit court opinions have mentioned *Waite* approvingly. Only one, however, definitely approved the "equalization" approach to an equal protection challenge, *see Johnson* v. *Robinson*, *supra*, and the expression of approval in *Johnson* is dicta. (The court, observing that appellant wished the "constitutional suggestion" of *Waite* transformed into a holding, required appellant first to present his *Waite*-base argument to the local District of Columbia courts.) In *United States* v. *Ecker*, *supra*; *United States* v. *Brown*, *supra*; and *Dixon* v. *Jacobs*, *supra* (Leventhal, J., concurring and dissenting), the court reaffirmed *Waite's* "equal footing" conclusion; *i.e.*, that at the end of the maximum period for which acquitees could have been sentenced, no differentiation is acceptable between them and commitees. It is not clear, however, that those opinions adopted the "equalization" analysis mandating additional, remedial procedures for acquitees at that point.

[5] For discussions of the irrationality of basing a finding of present mental illness on a previous doubt about sanity, *see United States* v. *Brown*, *supra* at 409, 478 F.2d at 613 (Wright, J., dissenting); *Bolton*, *supra* at 6, 395 F.2d at 647.

had remained confined in a mental hospital without ever receiving constitutional, procedural protections.[6]

Jones, on the other hand, is a post-*Bolton*, post-1970 acquitee. Unlike Waite, Jones carried the burden at his criminal trial of proving by a "preponderance of the evidence" that he was insane at the time he committed the offense. D.C. Code 1973, § 24-301(j). In addition, while receiving less than a *Bolton* (civil commitment) hearing after the criminal trial, Jones did receive substantially more protection than Waite by virtue of the § 24-301(d)(2) "release hearing." Thus, upon Jones' indefinite commitment, he was in a factually different posture from Waite vis-a-vis civil commitees. *See Johnson* v. *Robinson*, 166 U.S.App.D.C. 62, 66, 509 F.2d 395, 399 (1974).

Second, at the time of indefinite commitment, Jones also was in a legally different posture from Waite vis-a-vis civil commitees. Because Waite was a pre-*Baxstrom*, pre-*Bolton* acquitee, his initial commitment was constitutionally invalid; the court accordingly found him, as a matter of law, "situated differently" from a civil commitee. *Waite, supra*, at 288-89, 475 F.2d 399-400. Jones, to the contrary, proceeds from the premise that the § 24-301(d) safeguards in his release hearing were constitutionally sufficient to fill the historical gap in protection (upon initial commitment) between acquitees and commitees—the gap which persuaded the circuit court to assist Waite, and Bolton before him, on equal protection grounds.

The present case, therefore, is significantly different from *Waite*, which was a decision explicitly limited to pre-*Bolton* acquitees. *Waite, supra* at 285 n.8, 475 F.2d at 396 n.8. We are presented here with a much narrower

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[6] That the inequity of the situation may have influenced the court's reasoning is intimated by the *Waite* opinion, *Waite* v. *Jacobs, supra* at 284 n.7, 475 F.2d at 395 n.7, and by *Johnson* v. *Robinson, supra* at 63, 509 F.2d at 396, both of which referred to the "anomaly" created by *Bolton's* prospective application.

question: whether, as a matter of equal protection, the differences in *valid* initial commitment procedures for acquitees and commitees are nevertheless significant enough to require a remedy for the acquitee at the expiration of the maximum period for which he could have been sentenced—a remedy granting him either his outright release or a second (this time purely civil) commitment proceeding. The constitutional rationale for such a remedy, assuming for argument's sake the validity of *Waite's* equalization theory for equal protection, would be that the post-1970 acquitee, like the pre-*Bolton* acquitee, has been "situated differently" from a commitee (while treated the same), despite the presumed validity of the respective initial commitment procedures. We therefore must examine whether, as a matter of law, situational differences can be said to exist upon confinement.

An acquitee's § 24-301 release hearing and a commitee's § 21-545(b) civil commitment hearing both purport to determine whether one is mentally ill and dangerous.[7] Thus, these respective procedures can result in differently situated confinees only if the acquitee's hearing results in a perversion of that determination when compared with a commitee's hearing.

One such perversion would be a determination derived, in part, by reference to the criminal offense.[8] Because

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[7] The determination for an acquitee is whether he "has recovered his sanity [and] . . . will not in the reasonable future be dangerous to himself or others." D.C. Code 1973, § 24-301(e). The determination for a potential commitee is whether "the person is mentally ill and, because of that illness, is likely to injure himself or other persons if allowed to remain at liberty." D.C. Code 1973, § 21-545(b).

[8] More particularly, one might argue that an acquitee's commitment is actually based on more than a mentally ill and dangerous finding—that the acquitee's burden to prove his sanity, without right to jury trial, reflects a punitive gloss derived from his previous criminal behavior. It would follow that an acquitee is situated differently from a commitee because this extra, punitive basis

appellant's confinement after a § 24-301 release is not challenged, however, appellant must be presumed to agree that this confinement is not based, even in part, on punitive considerations; otherwise, it would be unconstitutional under *Baxstrom, supra; see Humphrey* v. *Cady*, 405 U.S. 504, 510-11 (1972); *Waite, supra* at 285-86, 475 F.2d 396-97; note 8 *supra*. Therefore, absent any explanation as to why the § 24-301(d) release hearing results in lesser quality findings of illness and dangerousness than a § 21-545(b) civil commitment hearing, we must conclude that the findings are legally the same.

It is true, of course, that appellant's criminal offense is the reason why his confinement took place by way of § 24-301(d), not § 21-545(b). Thus, in order to be as clear as possible why it makes no legal difference in this case whether appellant was initially confined under the "insane criminal" or the civil commitment procedure, we should explain (without deciding) the argument why § 24-301(d) is not punitive—why, under § 24-301(d) the criminal offense does not provide a basis for confinement. Once it is clear that § 24-301(d) and § 21-545(b) arguably establish equally valid procedures for determining mental illness and dangerousness, it should then be clear why appellant's request here—release or civil commitment at the end of the maximum potential prison term—is inconsistent with the presumed validity of his confinement.

Arguably, the acknowledged differences between the two procedures—most notably the right to jury trial and allocation of the burden of proof to the government under the civil commitment scheme—can be justified by reference to situational differences between the two groups immediately prior to the respective hearings. The civil commitment question, as to any potential commitee, is of first impression, whereas the "release hearing" procedure

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for commitment has permitted an abbreviated, more burdensome release hearing, resulting, arguably, in a less valid finding of mental illness and dangerousness than the civil commitment process would yield.

for an acquitee presumably can be somewhat abbreviated because of the predictive value of the initial determinations of insanity and dangerousness at the criminal trial. (That predictive value rests on the defendant's own prior proof of his insanity by a preponderance of the evidence—by a jury trial if he requested it.) Whereas the § 24-545 (b) hearing, therefore, represents a de novo process, the § 24-301(d) hearing is an updating process to determine how present mental status compares with earlier findings which had been urged by the defendant himself. *See* note 7 *supra*. In either case, the only concern is a determination as to sanity and dangerousness, with a view to rehabilitation. Given these situational differences between acquitees and potential commitees immediately prior to the initial commitment determination, the difference in hearing procedures is arguably justified; there is no constitutional prohibition against rational differences in the treatment of differently situated persons.

There is accordingly, no room for appellant's contention that his hospital confinement must cease (subject to civil commitment) at the end of the maximum term for which he could have been confined to prison. Although the confinement procedures differ for acquitees and commitees, the status of each group after confinement is the same: each has been found mentally ill and dangerous, and each, as a result, has been confined for the protection of self or society, as well as for treatment, not punishment.[9] The termination of the maximum sentence period is thus irrelevant to the status of acquitees; that termination does not alter the similarity of situation between acquitees (after confinement) and commitees.

In summary, the length of a hypothetical potential prison term has no relationship to the rehabilitative goal of hospital confinement. If, as the presumed validity of

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[9] Appellant has not argued that his physical or other treatment at St. Elizabeths, as an acquitee, differs in a legally significant way from that accorded to commitees.

appellant's initial commitment implies, the differences in hearing procedures for acquitees and commitees are justified because, prior to hearing, they are differently situated, there is no rational, let alone constitutional, basis for arguing that an abrupt change of procedure is required simply because somewhere along the line the hypothetical maximum sentence has ended. The proper context for analysis is rehabilitating the patient, not ending a penal sentence.

IV.

There is, however, a final point to be made. In holding that the principles of *Baxstrom*, *supra*, *Bolton*, *supra* and *Waite*, *supra*, do not require release (or civil commitment) of a person if validly committed pursuant to a § 24-301(d) release hearing, we feel bound to make clear that this decision does not affect the continuing validity of *Bolton*, *supra* with respect to post-commitment acquitees. As noted earlier, the chapter 24 criminal commitment scheme for acquitees does not mandate the regular six-month review, initiated by the hospital, afforded to civil commitees by § 21-548. Chapter 24 only provides for review at the hospital's initiative, § 24-301(e), upon the acquitee's motion for relief, § 24-301(k), or upon petition for habeas corpus, § 24-301(g). Because post-commitment acquitees and commitees are similarly situated, we conclude that, as a matter of constitutional equal protection, acquitees are entitled to periodic review similar to that afforded to civil commitees. *See Bolton*, *supra*. Accordingly, we hold that D.C. Code 1973, § 21-548, shall be deemed applicable to hospitalized acquitees at least to the extent required by *Bolton*, *supra*. *See* note 2 *supra*.[10]

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[10] We feel constrained by *M.A.P.* v. *Ryan*, D.C.App., 285 A.2d 310 (1971) both to acknowledge—and not go beyond—the holding in *Bolton*, *supra* on this point.

V.

Appellee's motion for summary affirmance is granted. Appellant's motion for summary reversal is denied. As a result, appellant Jones' commitment order is sustained, subject to his right to periodic review in accordance with this opinion.

So ordered.

MACK, *Associate Judge*: I read the majority opinion as holding that the right to release of a person acquitted of a crime, but confined because of mental illness, cannot turn upon the length of a sentence that the person might have received had he been convicted. I do not read the opinion as suggesting that the procedures outlined in D.C. Code 1973, § 24-301 would pass muster as against a challenge on equal protection or procedural due process grounds. *See Jackson* v. *Indiana*, 406 U.S. 715 (1972). For these reasons I concur.

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 11918

MICHAEL A. JONES, APPELLANT

v.

UNITED STATES, APPELLEE

On Petition for Rehearing

(Hon. Eugene N. Hamilton, Hearing Judge)

(Argued April 16, 1979 Decided February 4, 1980)

Before KELLY, MACK, and FERREN, *Associate Judges.*

Opinion for the court by *Associate Judge* FERREN.

Concurring opinion by *Associate Judge* MACK.

Dissenting opinion by *Associate Judge* KELLY.

FERREN, *Asssociate Judge*: Michael A. Jones was found not guilty of petit larceny by reason of insanity. Thereafter, the court held a "release hearing" pursuant to D.C. Code 1973, § 24-301(d), and committed Jones indefinitely to St. Elizabeths Hospital. In our first opinion, reported at 396 A.2d 183 (1978), we rejected Jones' contention that he is entitled, as a matter of equal protection, to release from St. Elizabeths upon expiration of the maximum period for which he could have been imprisoned unless the government carries the burden of proving at a civil commitment hearing that he is still mentally ill and dangerous to self or others. *See* D.C. Code 1973, § 21-545(b). More specifically, assuming the validity of Jones' confinement after the "release hearing" (which is uncontested here), we held there is

> no constitutional requirement that appellant be released or civilly committed at the end of the maximum imprisonment period, for that period bears no

> relationship to the unchallenged basis for appellant's hospital confinement: that he is mentally ill, is dangerous to self or others, and should receive treatment until he is well enough for release. [*Jones, supra* at 184.]

After reconsideration, we vacate our first order. We conclude that an acquitee may not be confined for treatment pursuant to § 24-301(d) beyond the maximum period for which he or she could have been imprisoned for the underlying criminal charge. An acquitee is entitled to release at the end of that period unless the government obtains a civil commitment. Accordingly, because that maximum period of one year has expired here, appellant Jones shall be released unless civilly committed forthwith.

Central to the analysis in our first opinion was the following legal premise, based on *Baxstrom* v. *Herold*, 383 U.S. 107 (1966): if commitment to St. Elizabeths after a § 24-301(d)(2) "release hearing" is to survive an equal protection challenge, it may not be punitive in any respect.[1] In other words, the commitment procedure must be wholly rehabilitative—wholly a process for finding someone mentally ill and dangerous to self or others.

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[1] In *Baxstrom*, the Court held that a prisoner who was civilly committed as insane at the end of his prison term was denied equal protection by a statutory procedure which deprived him of a jury review accorded to other civil commitees. Since *Baxstrom*, the Court has upheld other equal protection challenges by individuals who enter mental health facilities through the criminal process. *See Jackson* v. *Indiana*, 406 U.S. 715 (1972) (equal protection violated by state procedures which provide more lenient commitment standards and more stringent release standards for those criminal defendants found incompetent to stand trial than for those civilly committed); *Humphrey* v. *Cady*, 405 U.S. 504 (1972) (remand for evidentiary hearing on claim that protections afforded those civilly committed were not extended to those committed under sex crimes act).

Jones, supra at 188 & n.7.[2] Consequently, we concluded that appellant's failure to challenge the § 24-301(d) "release hearing" procedure meant that

> appellant must be presumed to agree that this confinement is not based, *even in part*, on punitive considerations; otherwise, it would be unconstitutional under *Baxstrom, supra; see Humphrey* v. *Cady*, 405 U.S. 504, 510-11 . . . (1972); *Waite* [v. *Jacobs*, 154 U.S.App.D.C. 281, 285-86, 475 F.2d 392, 396-97 (1973)] . . . . Therefore, absent any explanation as to why the § 24-301(d) release hearing results in lesser quality findings of illness and dangerousness than a § 21-545(b) civil commitment hearing, we must conclude that the findings are legally the same. [*Jones, supra* at 189 (emphasis added).] [3]

In his petition for rehearing, appellant questions our legal premise. He argues, in effect, that the § 24-301(d) "release hearing" procedure is to some extent punitive, as evidenced by the less-protective procedures afforded acquitees than civil commitees; that *Baxstrom, supra*, does not necessarily make that procedure unconstitutional as a means for initially confining acquitees; but that the

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[2] Put still another way, if § 24-301(d) is constitutional, it must merely be another equally valid route to the same finding derived from the civil commitment process under D.C. Code 1973, § 21-545(b). *See Jones, supra* at 188 n.7.

[3] We concluded, accordingly, that there was "no room for appellant's contention that his hospital confinement must cease (subject to civil commitment) at the end of the maximum term for which he could have been confined to prison. Although the confinement procedures differ for acquitees and commitees, the status of each group after confinement is the same: each has been found mentally ill and dangerous, and each, as a result, has been confined for the protection of self or society, as well as for treatment, not punishment. The termination of the maximum sentence period is thus irrelevant to the status of acquitees; that termination does not alter the similarity of situation between acquitees (after confinement) and commitees." [*Jones, supra* at 189 (footnote omitted).]

price of constitutionality is release or civil commitment at the end of the hypothetical maximum prison term, since that is the longest an acquitee can be confined for punitive reasons without a denial of equal protection of the laws.

Appellant derives his argument primarily from *United States* v. *Brown*, 155 U.S.App.D.C. 402, 407-08, 478 F.2d 606, 611-12 (1973), in which the United States Court of Appeals for the District of Columbia Circuit acknowledged—and upheld—a partially punitive underpinning to the former § 24-301(d) procedure. Specifically, the *Brown* court upheld an instruction, based on *Bolton* v. *Harris*, 130 U.S.App.D.C. 1, 395 F.2d 642 (1968), that the government had the burden at a "release hearing" of proving respondent mentally ill and dangerous by a preponderance of the evidence, and further held that this instruction would not violate equal protection even if the government, in a civil commitment proceeding, had the burden of proof beyond a reasonable doubt.[4] The *Brown* majority justified this lesser burden of proof in the criminal commitment procedure in the following way:

> The difference between the classes [acquitees and commitees] for purposes of burden of proof, is in the extent of possibility and consequence of error. If there is error in a determination of mental illness that results in a civil commitment, a person may be deprived of liberty although he never posed any

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[4] The *Brown* court, therefore, was dealing with the earlier § 24-301(d) procedure. In the present case we deal with the post-1970 scheme under which an acquitee has the burden of proving, by a preponderance of the evidence, that he has recovered his sanity. *See Jones, supra* at 185.

The recent case of *In re Nelson*, D.C.App., —— A.2d —— (No. 13768, Dec. 4, 1979), indicated that the proper burden of proof in civil commitments should be "clear and convincing evidence" rather than proof "beyond a reasonable doubt" in light of *Addington* v. *Texas*, 99 S.Ct. 1804 (1979). The level of the government's burden in civil commitment proceedings does not affect our analysis here, however, since the burden remains on the government.

> harm to society. If there is a similar error in confinement of an insanity-acquitted individual, there is not only the fact of harm already done, but the substantial prospect that the same error, ascribing the quality of mental disease to a less extreme deviance, resulted in a legal exculpation where there should have been legal responsibility for the antisocial action.
>
> The matter now being discussed is suffused with the broad consideration that modern standards of the insanity defense, not restricted to those who do not know right from wrong, call for the acquittal of persons who "may have meaningful elements of responsibility." And over and above the difficulty of situations where the issue of mental responsibility is doubtful, we cannot wholly ignore the danger of calculated abuse of the insanity defense, referred to in *Lynch* v. *Overholser* [, 369 U.S. 705 (1962)]. [*Brown*, *supra* at 407, 478 F.2d at 611 (footnote omitted).]

Appellant points out that *Brown* went on to suggest, on the basis of *Baxstrom*, *supra*, that there is a *quid pro quo* for this weaker insanity commitment standard, namely, that an acquitee is constitutionally entitled as of the end of the maximum prison term to release or, at worst, to civil commitment:

> The clear implications of the foregoing analysis, and *Baxstrom*, require, however, that when the individual has been in detention for a considerable period of time, his continued detention *vel non* should be governed by the same standard of burden of proof as applies to civil commitments. The extent of that period calls for sound discretion, would take into account *e.g.*, the nature of the crime (violent or not), nature of treatment given and response of the person, would generally not exceed five years, and should, of course, never exceed the maximum sen-

tence for the offense, less mandatory release time. [*Brown, supra* at 408, 478 F.2d at 612 (footnote omitted).]

In summary, appellant argues that he had been led down the road by the United States Court of Appeals in *Brown, supra,* to a point beyond which he thought he would be taken seriously in a constitutional challenge to § 24-301(d).[5] That court had told him, in essence, not to bother challenging the release-hearing procedure but instead to assume that a partially-punitive commitment is valid under *Baxstrom, supra.* Thus, he asserted the right to release or civil commitment as of the end of the maximum prison term—at the point where society's right to any punitive gloss on confinement ends. Accordingly, he says, our first opinion in this case viewed his failure to attack § 24-301(d) incorrectly—and unfairly—by concluding that it could only have one meaning: tacit acceptance of a wholly rehabilitative underpinning to the commitment procedure, which justifies confinement beyond the maximum prison sentence.[6] We turn to this argument.

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[5] Appellant presumably would acknowledge, however, that *Brown, supra,* as a post-reorganization decision, is not binding on the court. *See M.A.P.* v. *Ryan,* D.C.App., 285 A.2d 310 (1971).

[6] Our assumption that appellant's acceptance of § 24-301(d) necessarily implied his agreement that the process was wholly rehabilitative was based on our view that *Baxstrom, supra,* and *Humphrey* v. *Cady,* 405 U.S. 504 (1972), would constitutionally preclude confining acquitees under procedures less protective than those accorded to commitees if such confinement were "based, even in part, on punitive considerations." *Jones, supra* at 189. Thus, if § 24-301(d) were valid as a wholly rehabilitative procedure and confinement, any difference from a civil commitment determination under § 21-545(b) could only be justified on evidentiary grounds; *i.e.,* in contrast with a civil commitment, "the 'release hearing' procedure for an acquitee presumably can be somewhat abbreviated because of the predictive value of the initial determinations of insanity and dangerousness at the criminal trial." *Jones, supra* at 189. Because there is authority for such analysis, *see, e.g.,*

II.

In reconsidering appellant's assumption, solely for the sake of argument, that § 24-301(d) is valid, we must put the question in perspective by outlining the differences between the civil and criminal commitment schemes. Appellant, as an acquittee, carried the burden of proving his insanity at the time of the charged offense by a preponderance of the evidence. He had the right to a jury if he had wanted one. Upon a verdict of not guilty by reason of insanity, the District, like many states, permits continued confinement for a prescribed, relatively brief period of observation.[7] The courts have justified this confinement, which is not required in cases of civil commitment,[8] on at least two grounds. Some have stressed the continuing presumption of insanity once established by the acquitee—an evidentiary emphasis. *See, e.g., In re Franklin*, 7 Cal. 3d 126, 136, 496 P.2d 465, 470, 101 Cal. Rptr. 553, 558 (1972) (en banc). Others have

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In re Franklin, 7 Cal.3d 126, 496 P.2d 465, 101 Cal. Rptr. 553 (1972) (en banc), we interpreted appellant's acceptance of his confinement under § 24-310(d) as acceptance of a purely evidentiary justification for the differences between the criminal and civil commitment procedures—a justification presuming equally valid findings of mental illness and dangerousness under §§ 21-545(b) and 24-301(d). *See Jones, supra* at 188 n.7.

[7] In the District of Columbia, automatic confinement cannot exceed 50 days, D.C. Code 1973, § 24-301(d). In *Franklin, supra* at 143, 496 P.2d at 475, 101 Cal. Rptr. at 563, the court approved a 90-day period in California. The Model Penal Code allows six months, ALI Model Penal Code § 4.08 (Proposed Official Draft 1962).

[8] For example, in the District of Columbia, persons may be detained at a public or private hospital for up to 48 hours for emergency observation and diagnosis upon application by an appropriate authority and certification by a psychiatrist. D.C. Code 1973, §§ 21-521, -522. A detained individual must be released after 48 hours, however, unless a court order is obtained. D.C. Code 1973, § 21-523. *Williams* v. *Meredith*, D.C.App., 407 A.2d 569 (1979).

emphasized the dangerousness inherent in the offense excused by insanity, and the need for protection of the public while psychiatric observation takes place—arguably a punitive emphasis. *See, e.g., Chase* v. *Kearns*, 278 A.2d 132, 135 (Me. 1971) (en banc).

These same courts, moveover, commonly justify statutory confinement beyond the observation period if, after a review proceeding (akin to a § 24-301(d)(2) "release hearing"), the acquitee fails to sustain the burden of persuading the court that he or she has recovered. Their reasoning reflects an extension of the justification for the observation period. First, apropos of the evidentiary emphasis, the courts note that the acquitee has initiated and once sustained the burden of proving insanity, whereas the prospective civil commitee has not yet so conclusively manifested mental illness and dangerousness. Thus, the presumption of an acquitee's insanity continues. Second, these courts conclude that, because the trier has found beyond a reasonable doubt that the acquitee has committed the charged offense (although he or she is not rationally or morally responsible for that act), it is not unreasonable for society, as a matter of self-protection, to demand that the acquitee receive treatment for mental illness. Such treatment can be justified for at least as long as the maximum possible prison term he or she would have received, unless the acquitee can carry the burden of demonstrating an earlier recovery. The courts accordingly perceive a situational difference between acquitees and commitees constitutionally sufficient to justify keeping the burden of proof on the former but not the latter. *See Franklin, supra* at 138, 496 P.2d at 476, 101 Cal. Rptr. at 560 (acquitees are an "exceptional class"); *Chase, supra* at 138 (same).

After reviewing numerous cases, we conclude that the courts typically mix evidentiary and punitive rationales in justifying less comprehensive review of acquitees at "release hearings" than is afforded civil commitees at

such proceedings.[9] In view of this precedent, we must agree that appellant's willingness to assume the constitutional validity of § 24-301(d)(2) cannot, in fairness, be said to imply a concession that all aspects of that procedure are justified solely on evidentiary (and thus non-punitive) grounds.[10]

III.

Now that we are confronted by the possibility that the criminal commitment procedure can, to some extent, be punitive yet constitutional, we must reconsider the nature of a § 24-301(d) confinement. There are three possibilities, not two as we originally perceived: (1) it is wholly rehabilitative (*i.e.*, not at all punitive), in which case an acquitee can be committed indefinitely, without regard to a hypothetical maximum prison sentence, subject only to the periodic review afforded civil commitees, *see Jones, supra* at 190; or, at the other extreme, (2) it is inherently punitive, in which case the release hearing procedure itself is unconstitutional, *see Baxstrom, supra; Humphrey* v. *Cady*, 405 U.S. 504, 510-11 (1972);

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[9] *See, e.g., Mills* v. *State*, 256 A.2d 752, 755-57 (Del. 1969) (upholding release hearing procedure using regular superior court jury with burden of proof on acquitee; both rationales); *State* v. *Allen*, 166 N.W.2d 752, 758 (Iowa 1969) (acquitees may be required to prove regained sanity beyond a reasonable doubt; evidentiary and punitive rationales); *State* v. *Shackford*, 262 A.2d 359, 366 (Me. 1970) (same; punitive rationale); *Daniels* v. *Superintendent*, 34 Md.App. 173, 180, 366 A.2d 1064, 1069 (Ct. Spec. App. 1976) (acquitees can be required to carry burden of proof; evidentiary rationale); *State* v. *Taylor*, 158 Mont. 323, 331, 491 P.2d 877, 881 (1971), *cert. denied*, 406 U.S. 978 (1972) (same; punitive rationale); *In re Lee*, 46 App. Div.2d 999, 1000, 362 N.Y.S.2d 635, 636-37 (1974) (district attorney may participate in acquitee's release hearing; punitive rationale).

[10] Accordingly, we retract the statement in our first opinion that "appellant must be presumed to agree that this confinement is not based, even in part, on punitive considerations; otherwise it would be unconstitutional under *Baxstrom, supra; see Humphrey* v. *Cady* . . . ." *Jones, supra* at 189.

Brown, supra at 409-10, 478 F.2d at 613-14 (Wright, J., dissenting); *Waite, supra* at 285-86, 475 F.2d at 396-97;[11] or, as appellant urges, (3) it is partially (but perhaps justifiably) punitive at the outset, in which case an acquitee, although lawfully confined for awhile, arguably must be released (or civilly committed) no later than the end of the maximum prison term for which the acquitee could have been sentenced.[12] *See Brown, supra* at 408, 478 F.2d at 612.

Assuming the constitutional validity of § 24-301(d), we must choose between the first and third alternatives to decide the issue raised by appellant.[13] If we conclude—as previously assumed—that § 24-301(d) is wholly rehabilitative, then our first opinion and order will stand. If, however, we conclude that § 24-301(d) in some respects is punitive, then appellant's argument may have merit.

Confronting the question that we dealt with only hypothetically in our first opinion, we reject the view that

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[11] In this case, an acquitee would be entitled to release or to civil commitment proceedings promptly after the insanity acquittal. *See Bolton, supra.*

[12] We understand appellant to base his argument on the hypothetical maximum prison term to which the acquitee himself could be sentenced, not simply on the maximum sentence for the particular crime involved, without regard to the acquitee's own criminal history. We do not, however, resolve that question here.

[13] Appellant declines to question the constitutionality of § 24-301(d) and we agree that this court should not issue an advisory opinion on that subject. On the other hand, appellant has said that assuming the validity of § 24-301(d), he should not be held—as in our first opinion—to assume that it in no respect is punitive, since there is respectable legal precedent for the view that release-hearing procedures can be constitutional while partially punitive. We agree. Therefore, if, after examining § 24-301(d), we conclude that it *is*, to some extent, punitive, we properly can refrain from evaluating its constitutionality and, instead, can make a narrower analysis determining whether such punitive procedures can be imposed for an indefinite period.

an acquitee's mental illness and dangerousness at the time of the offense are consistently such powerful evidence of illness and dangerousness later (*i.e.*, at the time of the "release hearing") that they raise a presumption of continuing insanity in every case. *See Brown*, *supra* at 409-10, 478 F.2d at 613-14 (Wright, J., dissenting); *Bolton*, *supra* at 8, 395 F.2d at 649. Thus, contrary to the assumption underlying our first opinion, we conclude that the difference between criminal and civil commitment procedures [14] cannot be justified on purely evidentiary grounds. It follows, therefore, that if society legitimately can place a greater burden on the acquitee to avoid continued confinement than it places on a prospective civil commitee, that burden must be justified by the public's interest in greater protection than it would be likely to receive by subjecting acquitees to the civil commitment process. Furthermore, because § 24-301(d) is premised, in part, on an earlier criminal offense—a confinement which might not have occurred if the government had the burden of proof before a new jury—this release-hearing procedure is, to some extent, "punitive."

The public's interest in safety is, of course, limited by the acquitee's right to equal protection. Assuming the best case for the constitutionality of § 24-301(d), appellant argues that its partially punitive character at least dictates, as a matter of equal protection vis-a-vis civil commitees, that acquitees be released (or civilly committed) no later than the end of the maximum prison term they could have received if criminally convicted. We agree.

According to *Baxstrom*, *supra* at 111, "[e]qual protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made" (citation omitted). *Accord*, *Bolton*, *supra* at 10, 395 F.2d at 651. On the basis of the par-

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[14] *Compare* D.C. Code 1973, § 24-301(d) *with* § 21-545(b).

tially punitive rationale for the criminal commitment scheme set forth earlier, *see* text and cases at note 9 *supra*, the criminal commitment scheme might survive equal protection scrutiny under *Baxstrom*, *supra*, even though the procedure for confining civil commitees provides greater protection for the individual at the outset (the right to a jury and burden of proof on the government). We agree with appellant, however, that there is no basis for confining an acquitee under § 24-301(d) beyond the length of the hypothetical maximum prison term, since that term marks the end of society's claim on that individual for any kind of punishment. Any longer confinement must depend, constitutionally, on a *de novo* civil commitment. *See Humphrey*, *supra* at 510-11; *Baxstrom*, *supra* at 110-11; *Brown*, *supra* at 408, 478 F.2d at 612.[15]

IV.

Accordingly, we hold that because the maximum possible prison term for which appellant Michael Jones could have been incarcerated has expired, he is entitled to release from St. Elizabeths Hospital, subject to the government's right to seek civil commitment. The opinion and judgment heretofore filed are therefore vacated. The government shall have 30 days from the date of the mandate issued pursuant to today's order in this case to initiate civil commitment proceedings against appellant. Once those proceedings have been initiated, he shall be confined, if at all, in accordance with Title 21 of the District of Columbia Code. In the event that appellant does not become the subject of civil commitment proceed-

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[15] It is important to stress that if the § 24-301(d) release hearing is valid, as assumed, despite a partially punitive underpinning, our holding permits confinement under § 24-301(d) to the end of the maximum applicable prison term, no matter how long that may be. We perceive no basis for the *Brown* court's view that the punitive justification for § 24-301(d) may expire short of the maximum sentence (and "would generally not exceed five years"). *Id.* at 408, 478 F.2d at 612.

ings during this 30-day period, he shall be given his freedom.

So ordered.

MACK, *Associate Judge*, concurring: I concurred in our first opinion, 396 A.2d 183 (1978), because I did not construe that analysis as holding that the criminal commitment procedures of D.C. Code 1973, § 24-301 would pass muster as against a challenge on equal protection or procedural due process grounds, citing *Jackson* v. *Indiana*, 406 U.S. 715 (1972). I concur in the instant holding because the serious reservations that I held about the constitutionality of such procedures are erased by our choosing to mandate that an acquitee must be released from incarceration at the expiration of the maximum period of possible imprisonment for the criminal charge, subject to the government's right to seek civil commitment.

KELLY, *Associate Judge*, dissenting: I would adhere to our original decision to affirm the order on appeal (*Jones* v. *United States*, D.C.App., 396 A.2d 183 (1978)) and so dissent from this opinion on rehearing.

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 11918

MICHAEL A. JONES, APPELLANT

v.

UNITED STATES, APPELLEE

On Petition for Rehearing En Banc

(Hon. Eugene N. Hamilton, Trial Judge)

(Argued En Banc Sept. 8, 1980 Decided May 29, 1981)

Before NEWMAN, *Chief Judge*, and KELLY, KERN, GALLAGHER,* NEBEKER, HARRIS, MACK, FERREN and PRYOR, *Associate Judges.*

Opinion for the court by *Associate Judge* KELLY.

Dissenting opinion by *Associate Judge* FERREN, with whom *Chief Judge* NEWMAN and *Associate Judge* MACK join.

KELLY, *Associate Judge*: Appellant Michael A. Jones is a mental patient at St. Elizabeths Hospital where he has been committed since March 1976, pursuant to D.C. Code 1973, § 24-301(d).[1] In February 1977, he appealed

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* Judge Gallagher was an Associate Judge of the court at the time of argument. His status changed to Associate Judge, Retired, on February 27, 1981.

[1] Subsection 24-301(d), which controls the commitment of persons found not guilty by reason of insanity (acquittees), reads:

> (d)(1) If any person tried upon an indictment or information for an offense raises the defense of insanity and is acquitted solely on the ground that he was insane at the time of its commission, he shall be committed to a hospital for the mentally ill until such time as he is eligible for release pursuant to this subsection or subsection (e).
>
> (2) A person confined pursuant to paragraph (1) shall have a hearing, unless waived, within 50 days of his confinement to

from an order by Judge Eugene N. Hamilton denying his request for immediate release from St. Elizabeths or in the alternative for civil commitment in accordance with the procedures set forth in D.C. Code 1973, § 21-545(b),[2]

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determine whether he is entitled to release from custody. At the conclusion of the criminal action referred to in paragraph (1) of this subsection, the court shall provide such person with representation by counsel—

(A) in the case of a person who is eligible to have counsel appointed by the court, by continuing any appointment of counsel made to represent such person in the prior criminal action or by appointing new counsel; or

(B) in the case of a person who is not eligible to have counsel appointed by the court, by assuring representation by retained counsel.

If the hearing is not waived, the court shall cause notice of the hearing to be served upon the person, his counsel, and the prosecuting attorney and hold the hearing. Within ten days from the date the hearing was begun, the court shall determine the issues and make findings of fact and conclusions of law with respect thereto. The person confined shall have the burden of proof. If the court finds by a preponderance of the evidence that the person confined is entitled to his release from custody, either conditional or unconditional, the court shall enter such order as may appear appropriate.

(3) An appeal may be taken from an order entered under paragraph (2) to the court having jurisdiction to review final judgments of the court entering the order.

[2] Subsection 21-545(b), concerning involuntary civil commitment, reads, in pertinent part:

If the court or jury finds that the person is mentally ill and, because of that illness, is likely to injure himself or other persons if allowed to remain at liberty, the court may order his hospitalization for an indeterminate period, or order any other alternative course of treatment which the court believes will be in the best interests of the person or of the public. The Commission, or a member thereof, shall be competent and compellable witnesses at a hearing or jury trial held pursuant to this chapter. The jury to be used in any case where a jury trial is demanded under this chapter shall be impaneled, upon order of the court, from the jurors in attendance upon other branches of the court, who shall perform the services in addition to and as part of their duties in the court.

basing his challenge to his continued confinement on the argument that detention beyond the maximum period for which he could have been imprisoned for the offense of which he was acquitted denies him equal protection of the laws.

Our first panel opinion, which relied on an express abstention from a challenge to his initial commitment, held that appellant had no right to the relief requested. *Jones* v. *United States*, D.C.App., 396 A.2d 183 (1978). Appellant petitioned for rehearing or rehearing en banc, objecting to the panel's decision as unfairly based on his abstention from a challenge to the initial commitment under D.C. Code 1973, § 24-301(d)(2). Rehearing was thereafter granted and a second opinion issued holding that appellant was entitled to immediate release unless the government civilly committed him pursuant to D.C. Code 1973, § 21-545(b) because the "release hearing procedure is to some extent 'punitive'" and it would be a denial of equal protection to confine appellant under criminal commitment procedures beyond his hypothetical maximum prison sentence. *Jones* v. *United States*, D.C. App., 411 A.2d 624 (1980). The government petitioned for rehearing en banc, disputing the determination that the District of Columbia commitment scheme for insane criminals is punitive. Its petition was granted and the case was reheard by the en banc court. Since our previous opinions were vacated, we consider anew appellant's equal protection claim and hold that he is not entitled to automatic release from St. Elizabeths upon the expiration of his hypothetical maximum prison sentence unless civil commitment proceedings are instituted by the government.

Appellant's commitment resulted from a September 1975, charge of attempted petit larceny. He was first admitted to St. Elizabeths because of a court-ordered competency examination.[3] On March 12, 1976, on stipulated

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[3] *See* D.C. Code 1973, § 24-301(a). The psychologist's report stated that appellant was competent to stand trial, but that he had

facts as to the crime and as to insanity, appellant was acquitted by the court of the charge by reason of insanity. On May 25, 1976, Judge James A. Washington held a "50-day release hearing" pursuant to D.C. Code 1973, § 24-301(d)(2)[4] and continued appellant's confinement at St. Elizabeths because of his failure to prove by a preponderance of the evidence that he was no longer mentally ill or dangerous to himself and others.[5] A further hearing was set for November 29, 1976. On that date, Judge Hamilton held a second hearing during which appellant raised the argument that his confinement under § 301(d) could not extend beyond his hypothetical maximum prison sentence and that he was therefore entitled to release. The court ordered the government to show cause why appellant should not be released or civilly committed under D.C. Code 1973, § 21-545(b). After a hearing in February of 1977, Judge Hamilton denied appellant's motion for immediate release or in the alternative, civil commitment, and continued his indefinite confinement at St. Elizabeths. A timely appeal from this order was filed on February 28, 1977.[6]

"signs and symptoms of a severe mental disorder, including auditory hallucinations" and that he should be hospitalized at St. Elizabeths for treatment.

[4] *See* note 1 *supra*.

[5] In an April 23, 1976 letter, the Superintendent of St. Elizabeths reported that Jones was suffering from schizophrenia, paranoid type, and was on medication. The letter also stated that "Mr. Jones is in need of further hospitalization, and by virtue of his mental illness, he would be a danger to himself and to others if released into the community at this time."

[6] A subsequent motion for unconditional release under § 301(k) was denied in March of 1977. Three months later, however, appellant was granted conditional release on terms recommended by St. Elizabeths' staff, allowing daytime and overnight visits into the community. He was also admitted into the civil division of the hospital, though as a result of disruptive behavior, he was retransferred to the forensic division.

Before analyzing appellant's equal protection claim, we deem it necessary to reject any suggestion that confinement pursuant to subsection 301(d) is punitive in nature. We recognize that appellant never explicitly made such an assertion, but that implication underlies his argument (and certainly our prior opinions) that the length of the prison sentence which an acquittee might have received determines when he is entitled to release or civil commitment under Title 24 of the D.C. Code. We conclude that there is no basis for finding § 301(d) punitive in any respect.

This court's decision in *Bethea* v. *United States*, D.C. App., 365 A.2d 64, 90 (1976), *cert. denied*, 433 U.S. 911 (1977), noted that "Congress struck a careful balance between the interests of the individual and those of the community," in the enactment of the District of Columbia commitment scheme for persons acquitted by reason of insanity. The purpose behind this careful balance was explained in *Hough* v. *United States*, 106 U.S.App.D.C. 192, 195, 271 F.2d 458, 461 (1959), when Judge Bazelon stated that

> [T]he basic policy underlying the statute . . . as we read the legislative history, is to provide treatment and cure for the individual in a manner which affords reasonable assurance for the public safety. . . .

More recent cases reiterate the dual purpose of § 301(d) as first, the treatment and recovery of the patient, and second, the protection of society and the patient. *Collins* v. *Cameron*, 126 U.S.App.D.C. 306, 308, 377 F.2d 945, 947 (1967); *Overholser* v. *O'Beirne*, 112 U.S.App.D.C. 267, 269, 302 F.2d 852, 854 (1961); *Ragsdale* v. *Overholser*, 108 U.S.App.D.C. 308, 312, 281 F.2d 943, 947 (1960). The 1970 amendments to § 301(d), enacted in response to the decision in *Bolton* v. *Harris*, 130 U.S. App.D.C. 1, 395 F.2d 642 (1968),[7] have not altered its

[7] *Bolton* held that acquittees are entitled to a hearing "substantially similar" to the hearings afforded civil commitees before they are indeterminately confined. The implications of this holding are more fully discussed below.

original purpose. *See United States* v. *Jackson*, 179 U.S. App.D.C. 375, 381, 553 F.2d 109, 115 (1976). Indeed, the *Bolton* decision inescapably leads to the conclusion of non-punitiveness. This is because *Bolton's* requirement of a separate judicial hearing before indeterminate commitment was intended to undo the punitive aspects attending the formerly automatic connection between the determination of guilt and the commitment of a defendant who pleaded insanity.

The exclusively remedial and protective goals of the statute demonstrate that a punitive rationale has no part in the commitment of persons acquitted by reason of insanity. We agree that

> [i]n the light of [the legislative] purpose [of § 301], we must reject the District Court's suggestion that appellant is a "prisoner." Nothing in the history of the statute—and nothing in its language—indicates that an individual committed to a mental hospital after acquittal of a crime by reason of insanity is other than a patient. The individual is confined in the hospital for the purpose of treatment, not punishment; and the length of confinement is governed solely by considerations of his condition and the public safety. Any preoccupation by the District Court with the need of punishment for crime is out of place in dealing with an individual who has been acquitted of the crime charged. [*Hough* v. *United States*, *supra* at 196, 271 F.2d at 462.]

Society may not excuse a defendant's criminal behavior because of his insanity and at the same time punish him for invoking an insanity defense. This would nullify that defense, contrary to express legislative intent, *see* D.C. Code 1973, § 24-301(j) (establishing procedures for pleading insanity), and raise serious constitutional issues.

The regulatory nature of § 301(d) is also evidenced by the non-adversarial character of commitment decisions.

All parties, including the government, the hospital [8] and the acquittee assist in presenting the facts relevant to a determination of the proper conditions and treatment for the insanity acquittee. *See United States* v. *Ecker*, 177 U.S.App.D.C. 31, 45, 543 F.2d 178, 192 (1976), *cert. denied*, 429 U.S. 1063 (1977); *Bolton* v. *Harris*, *supra* at 12 n.64, 395 F.2d at 563 n.64; *Lake* v. *Cameron*, 124 U.S.App.D.C. 264, 268, 364 F.2d 657, 661 (1966) (en banc).

Furthermore, plain reason compels rejection of appellant's reliance on his hypothetical maximum prison term as artificial and meaningless. Statutory maximum sentences have no relationship to the purposes of mental care and treatment. They are intended rather, to set the outer boundaries of lawful punishment for persons found criminally responsible for specified offenses. Not even convicted criminals are automatically sentenced to the maximum applicable term of incarceration. Subsection 301 (d) commitments are neither expressly nor impliedly related to statutory maximum sentences. To the contrary, § 301(d) contemplates an indeterminate period of confinement and treatment, depending on when the patient has recovered his sanity or no longer poses a danger to himself or others.[9] As *Dixon* v. *Jacobs*, 138 U.S.App. D.C. 319, 325, 427 F.2d 589, 595 (1970) explains:

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[8] In *Dixon* v. *Jacobs*, 138 U.S.App.D.C. 319, 330, 427 F.2d 589, 600 (1970), the circuit court in reversing the dismissal of an insanity acquittee's habeas corpus petition, stated that "Saint Elizabeths bears a special responsibility for assuring that information regarding the patient's condition is fully presented to the District Court, and that the court understandingly considers the information presented."

[9] Thus it would be more accurate to say, and certainly more analytically useful, that appellant is actually challenging the indeterminate length of his commitment at St. Elizabeths, rather than only his "continued" confinement there. Equal protection, if violated at all, would be just as well put into question at the inception of the commitment since it effectively means an indefinite period of confinement.

> Confinement of the mentally ill rests upon a basis substantially different from that which supports confinement of those convicted of crime. In the latter case, with rare exceptions, the continuing validity of confinement rests solely on the validity of the initial commitment. Confinement of the mentally ill, however, depends not only upon the validity of the initial commitment but also upon the continuing status of the patient. Specifically, under our statutes, he must be released from the hospital if he is no longer mentally ill; if, although he remains mentally ill, he is no longer "likely to injure himself or other persons"; or, should the patient so desire, if a course of outpatient treatment can be fashioned that will adequately protect the interest both of the patient and the public. [Footnotes omitted.]

The notion that the duration of an acquittee's hospitalization can be established by statute or court order ignores the most basic precepts of medicine and psychiatry. Unfortunately, the present state of the art makes it generally impossible to predict either the time required to rehabilitate a mental patient, if at all possible, or at what point he will cease to be a danger to himself or others. Only ongoing medical and psychiatric evaluation offer a realistic hope of such prognosis.[10] Therefore, reference to either a hypothetical maximum prison sentence, or even to a judicially limited commitment term would completely refute the statutory pur-

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[10] *See Addington* v. *Texas*, 441 U.S. 418, 430-31 (1979), and authorities cited therein, holding that the lack of certainty and the fallibility of psychiatric diagnosis make proof of insanity by clear and convincing evidence constitutionally sufficient. *Addington* also recognized that "[i]n a civil commitment state power is not exercised in a punitive sense." *Id.* at 428. While Chief Justice Burger's opinion did not deal with commitment of persons found not guilty by reason of insanity, a § 301(d) commitment is actually a civil, not a criminal proceeding and *Addington's* reasoning should apply with equal force to commitment of acquittees.

pose of § 301(d) and would frustrate any attempt at treating and rehabilitating mental patients who happen to have been acquitted of crimes by reason of insanity.

Our conclusion that § 301(d) is not punitive is supported by our recent decision in *United States* v. *Edwards*, D.C.App., —— A.2d —— (Nos. 80-294 & 80-401, May 8, 1981) (en banc), where the contention that incarceration inevitably constitutes punishment was rejected. Though commitment of acquittees is in no sense incarceration, the principle that the penal character of a statute depends on its underlying nature and whether it is reasonably supported by a legitimate state interest, applies equally to the analysis of commitment statutes.[11] There is no evidence that the District of Columbia statu-

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[11] *See Bell* v. *Wolfish*, 441 U.S. 520, 537-38 (1979). Factors relevant to the determination of whether a statute is punitive are:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions." [*Id.* at 537-38 (quoting *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).]

The *Bell* case also noted that

> A court must decide whether the disability is imposed for the *purpose* of punishment or whether it is but an incident of some other legitimate government *purpose* . . . . Absent a showing of an expressed *intent* to punish on the part of detention facility officials, that determination generally will turn on "Whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." [*Id.* at 538 (quoting *Kennedy* v. *Mendoza-Martinez*, *supra* at 168-69, and citing *Flemming* v. *Nestor*, 363 U.S. 603, 613-17 (1960) (emphasis added).]

tory scheme for commitment of insane criminals is anything but a regulatory, prophylactic statute, based on a legitimate governmental interest in protecting society and rehabilitating mental patients. Nor is § 301(d) rendered penal by the fact that it is predicated on the commission of a crime. Evidence of crime is only one of the elements triggering § 301(d) commitment, the other element being proof of insanity by a preponderance of the evidence. Since the crime is relevant only insofar as it indicates dangerousness, not evil or criminal responsibility, the presumption of continuing dangerousness, which is rebuttable by the acquittee, is both reasonable and valid.

Because we have no evidence in the record that the conditions of appellant's confinement are punitive or that his particular commitment was based on punitive considerations, we must conclude that appellant's detention is grounded on the legitimate non-punitive interests of the District of Columbia.

Appellant challenges his confinement under § 301(d) as violative of equal protection of the laws. The due process guarantee of the Fifth Amendment of the United States Constitution, which is directly applicable to the District of Columbia, encompasses the right to equal protection. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); *Matter of C.W.M.*, D.C.App., 407 A.2d 617, 625 (1979).

In the absence of specific objections to conditions of confinement or claims of inadequate or discriminatory treatment,[12] the validity of appellant's equal protection claim depends on whether the differences between the present § 301(d) commitment scheme and the involuntary commitment scheme under § 545(b) of Title 24 are justifiable by reason of the situational differences between acquittees and commitees.

Our analysis begins with the Supreme Court case of *Baxstrom* v. *Herold*, 383 U.S. 107 (1966), which held

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[12] The right to treatment for mental illness is recognized in *Tribby* v. *Cameron*, 126 U.S.App.D.C. 327, 379 F.2d 104 (1967), and *Rouse* v. *Cameron*, 125 U.S.App.D.C. 366, 373 F.2d 451 (1966).

that equal protection requires that a prisoner to be transferred to a mental hospital be given the same procedural protections as those afforded other persons subject to involuntary civil commitment. Two years later, the United States Court of Appeals for the District of Columbia found that *Baxstrom*'s equal protection holding, as well as the due process guarantees of *Specht* v. *Patterson*, 386 U.S. 605 (1967),[13] require that "persons found not guilty by reason of insanity . . . be given a judicial hearing with procedures substantially similar to those in civil commitment proceedings." *Bolton* v. *Harris*, *supra* at 10, 395 F.2d at 651 (footnote omitted). *Bolton* was expressly premised on the weakness of the proof of a defendant's insanity at the time of the offense; when *Bolton* was decided, the standard for acquittal was whether there was a reasonable doubt regarding past sanity. *Id.* at 8, 395 F.2d at 649. The 1970 amendments to § 301 have significantly narrowed this evidentiary gap by requiring that the defendant affirmatively prove his exculpating insanity to the jury by a preponderance of the evidence at the trial for his criminal offense. D.C. Code 1973, § 24-301(j).[14] The judicial hearing required by *Bolton* was codified in § 301(d)'s 50-day release hearing provision, notwithstanding the changed nature of the insanity defense.

The equal protection test suggested by these cases is that the procedures and standards of different commitment schemes be relevant to the classification and that any differences not be substantial. We therefore agree

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[13] *Specht* held that sentencing pursuant to Colorado's Sex Offenders Act was criminal punishment and violated due process because it made a conviction for a sex offense the basis of indeterminate sentencing without affording the defendant a hearing on the issue of his mental illness, dangerousness or recidivism.

[14] Subsection 301(j)'s shift in the burden of proof was upheld against constitutional attack in *Bethea*, *supra*, and *United States* v. *Greene*, 160 U.S.App.D.C. 21, 489 F.2d 1145 (1973), *cert. denied*, 419 U.S. 977 (1974).

with the statement in *United States* v. *Jackson*, *supra* at 386, 553 F.2d at 120, that § 301(d) "must be upheld if there is a rational basis for the scheme it creates." The court arrived at this conclusion by determining that neither *Jackson* v. *Indiana*, 406 U.S. 715 (1972) (indeterminate pretrial commitment procedures found to violate equal protection), nor *Baxstrom*, *supra*, held that strict scrutiny applies to procedures used for the criminal commitment of mentally ill persons.[15] In reviewing the petitioner's argument in *Baxstrom*, Chief Justice Warren stated that "[e]qual protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which classification is made." *Baxstrom*, *supra* at 111. *Bolton* also recognized that "a reasonable application [of the equal protection doctrine] permits Subsection (d) to treat persons acquitted by reason of insanity differently from civilly committed persons to the extent that there are relevant differences between those two groups." *Bolton*, *supra* at 10, 395 F.2d at 651. But substantial differences are prohibited under *Bolton*. *Id.* Thus, a reasonable distinction between the two statutory schemes would be one that is both relevant to the government's legitimate interests in the separate classification and not impermissibly substantial.

Before reviewing the differences between § 24-301(d) and § 21-545(b), it is important to note their similarities. First, the substantive standard of commitment is identical under both statutes. The twofold proof requirement of mental illness and dangerousness varies only in

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[15] *See also State* v. *Krol*, 68 N.J. 236, ——, 344 A.2d 289, 298 (1975) (questioning the equal protection test applicable to differences in commitment schemes required by *Baxstrom*, *supra*, and *Jackson* v. *Indiana*, *supra*) and Novak, *Realigning the Standards of Review Under the Equal Protection Guarantees—Prohibited, Neutral and Permissive Classifications*, 62 GEO. L. REV. 1071, 1101-03 (1974) (suggesting that *Jackson* v. *Indiana*, *supra*, and *Humphrey* v. *Cady*, 405 U.S. 504 (1972), were based on a "demonstrable rational basis" test).

the manner in which it is established.[16] Second, both § 24-301(d)(2) and § 21-545(b) provide for mandatory judicial hearings, with notice and assistance of counsel (court-appointed if necessary). These common characteristics constitute the essential due process rights associated with involuntary commitment. *See Vitek* v. *Jones*, 445 U.S. 480 (1980) (recognizing a prisoner's due process rights to a hearing before transfer to a mental health facility);[17] *Specht* v. *Patterson, supra.*[18]

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[16] The two-prong test is explicitly stated in § 21-545(b); however, § 24-301(d) only refers to an acquittee's entitlement to release. But it is reasonable to assume that the same standard governs § 301(d) release hearings by reference to § 24-301(e), which states that entitlement to release, upon hospital certification, depends on a showing that the acquittee is no longer mentally ill or dangerous.

[17] Justice White approvingly listed the following procedures outlined by the Nebraska District Court as the minimum required before transfer of a prisoner to a mental hospital:

> A. Written notice to the prisoner that a transfer to a mental hospital is being considered;
>
> B. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given;
>
> C. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state, except upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross-examination;
>
> D. An independent decisionmaker;
>
> E. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;
>
> F. Availability of legal counsel, furnished by the state, if the inmate is financially unable to furnish his own; and
>
> G. Effective and timely notice of all the foregoing rights." [*Vitek* v. *Jones, supra* at 494-95.]

[18] The *Specht* opinion held that

> Due process . . . requires that [the defendant] be present with counsel, have an opportunity to be heard, be confronted

Thus with respect to important constitutional protections the two statutes provide the same coverage.

As persuasively explained in our first panel opinion, the differences between the two procedures

> can be justified by reference to situational differences between the two groups immediately prior to the respective hearings. The civil commitment question, as to any potential commitee, is of first impression, whereas the "release hearing" procedure for an acquitee presumably can be somewhat abbreviated because of the predictive value of the initial determinations of insanity and dangerousness at the criminal trial. (That predictive value rests on the defendant's own prior proof of his insanity by a preponderance of the evidence—by a jury trial if he requested it.) Whereas the § 24-545(b) hearing, therefore, represents a de novo process, the § 24-301 (d) hearing is an updating process to determine how present mental status compares with earlier findings which had been urged by the defendant himself.... In either case, the only concern is a determination as to sanity and dangerousness, with a view to rehabilitation. Given these situational differences between acquitees and potential commitees immediately piror to the initial commitment determination, the difference in hearing procedures is arguably justified; there is no constitutional prohibition against rational differences in the treatment of differently situated persons. [*Jones* v. *United States*, *supra*, 396 A.2d at 189.]

There appear to be three differences between § 24-301 (d) and § 21-545(b) commitments: (1) the availability of jury trial, (2) the question of who carries the burden

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with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed. [*Id.* at 610.]

of proof, and (3) the amount of proof required to justify commitment.[19] We review these distinctions individually to ascertain whether they are permissibly relevant or impermissibly substantial under *Baxstrom* and *Bolton*.

While the jury trial right available to commitees is not similarly available to an acquittee in a 50-day release hearing, this difference is justified by the fact that the acquitee has had a right to a jury determination of his sanity at the time of the offense.[20] Thus the acquittee's mental illness is initially established by affirmative proof. Dangerousness is no less validly established by proof that the defendant committed the criminal act, a finding necessarily underlying any acquittal by reason of insanity. *See Bethea*, *supra* at 93-95; *Smothers* v. *United States*, D.C.App., 403 A.2d 306, 310 (1979). In *United States* v. *Ecker*, *supra* at 48, 543 F.2d at 195, the court stated that "[s]ince 1958 this court has consistently accepted the proposition that the dangerousness demonstrated by the commission of a crime and acquittal by reason of insanity constitutes a rational basis for the disparity of release provisions governing acquittees and commitees." (Footnote omitted). *Ecker* also recognized that some disparities in commitment proceedings are similarly permissible, *id.* at 49-50, 543 F.2d at 196-97, and explained that "[s]ubsection (d) patients are treated differently from civil commitees because they are 'an exceptional class of people' who have 'already unhappily manifested the reality of anti-social conduct.'" *Id.* at 50, 543 F.2d at 197 (footnotes omitted).

The fact that appellant's mental illness and dangerousness are not jury determined, but derived from a prior jury finding, is not significant since the continuation of

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[19] We do not compare the differences in post-commitment procedures since they are not covered in these subsections and appellant's claim is based on the alleged invalidity of his confinement under subsection 301(d).

[20] Appellant's waiver of the right to a jury at his criminal trial does not affect our argument.

these attributes is a rational and permissible evidentiary presumption.[21] In *Waite* v. *Jacobs*, 154 U.S.App.D.C. 281, 288-89, 475 F.2d 392, 399-400 (1973), the validity of this presumption was recognized:

> The rational justification for placing the burden of proof on a commitee is that his mental illness and dangerousness have previously been convincingly established. In light of those established facts, the law gives effect to a presumption of continuity of status. It comports with normal perceptions of reality—and hence is rational—to assume that, once a given status is proven to exist, it continues to do so in the absence of evidence showing the contrary to be more likely than not.

In *Waite*, however, the presumption was not applicable because unlike in the instant case, the appellant had never been afforded a post-acquittal judicial hearing on the question of his continued mental illness and dangerousness.

The availability of a jury trial under § 21-545(b) and the absence of such a right at a § 24-301(d) hearing is also an insubstantial difference because the findings of mental illness and dangerousness are based on expert testimony and are not matters uniquely within the province of a jury of lay persons. In *Addington* v. *Texas*, 441 U.S. 418, 429 (1979), the Court explained that in contrast to delinquence proceedings or criminal prosecutions where "the basic issue is a straightforward factual

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[21] It is also noteworthy that the Criminal Jury Instruction for the District of Columbia, No. 5.11 (3d ed. 1978), to be given when a defense of insanity is pleaded, informs the jury that the consequence of an acquittal by reason of insanity will be automatic commitment of the defendant to St. Elizabeths, followed by a release hearing within 50 days. The jury is also instructed that at this hearing the defendant must prove to the court, by a preponderance of the evidence, that he is entitled to release. This instruction was approved in *United States* v. *Brawner*, 153 U.S.App.D.C. 1, 29-30, 471 F.2d 969, 997-98 (1972).

question—did the accused commit the act alleged," the factual questions in a civil commitment proceeding "represent only the beginning of the inquiry." The Court continued: "Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists." *Id.* (emphasis in original). Thus, both judge and juror are forced to rely on expert evidence in commitment proceedings, significantly diminishing the importance of their personal judgment, values and experience. In sum, because (1) an acquittee has a right to a jury determination of past insanity at his criminal trial; (2) it is reasonable to presume the continuation of a mental illness; and (3) a jury right in commitment proceedings is not as meaningful as it is in ordinary criminal cases, the absence of a jury right at § 24-301(d) release hearing is not a substantial difference vis-à-vis § 21-545(b) civil commitment.

The second distinction between the two commitment procedures in the District of Columbia is the fact that the government bears the burden of proof in a § 21-545 (b) hearing, whereas in the 50-day release hearing, the acquittee must prove that he is no longer mentally ill or dangerous. It is entirely rational for the District to require an acquittee to prove his entitlement to release where he was the one to advocate the fact of his past insanity. Automatic § 301(d) commitment does not follow an acquittal by reason of insanity when the question of insanity is raised by the court or the prosecutor, rather than the defendant. *United States* v. *Wright*, 167 U.S.App.D.C. 309, 511 F.2d 1311 (1975). As mentioned above, the presumption that a mental condition continues is a reasonable one and it is also reasonable to require the person who raised the presumption to refute it by affirmative proof. Furthermore, whatever difference in risk allocation there might be between the two statutes as a result of who bears the burden of proof is mini-

mized by the fact that when the acquittee bears the burden, he need prove entitlement to release by only a preponderance of the evidence, the lowest standard of proof, whereas when the government bears the burden, it must prove insanity and dangerousness by a higher standard, namely that of clear and convincing evidence. *In re Nelson*, D.C.App., 408 A.2d 1233 (1979).

Yet this disparity in the level of proof by which mental illness and dangerousness are established under the two procedures, when not regarded as a counter-balance to the risk of non-persuasion, is another difference between § 24-301(d) and § 21-545(b) which must be justified as rationally related to the situational differences between acquittees and commitees. An acquittee's past insanity is proven by a preponderance of the evidence. His present insanity is determined by his failure to rebut, by a preponderance of the evidence, the presumption of continuing insanity. In contrast, a commitee's detention is based on clear and convincing evidence of mental illness and dangerousness. *In re Nelson, supra.*[22] The difference between these two standards is justified by the fact that Congress determined that a defendant raising an insanity defense should not have to meet a higher burden on such a relatively difficult issue. However, when the District seeks to commit a person who is disputing the fact of insanity or dangerousness, it is reasonable that the risk of error be more heavily thrust upon the government. *See Addington* v. *Texas, supra.*

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[22] Since appellant has not challenged his initial commitment, we view his argument as based on a present denial of equal protection. We note, however, that in May 1976, when appellant received his 50-day release hearing, the prevailing standard was proof beyond a reasonable doubt, *In re Hodges*, D.C.App., 325 A.2d 605 (1974) (overruled in *In re Nelson, supra*). The greater disparity in proof between the two commitment standards that existed when appellant was first committed would not alter our conclusion that the difference in the level of proof required is both rational and not so substantial as to violate equal protection.

In *Bolton*, *supra* at 10 n.50, 395 F.2d at 651 n.50, and in *United States* v. *Brown*, 155 U.S.App.D.C. 402, 478 F.2d 606 (1973), the circuit court also recognized that a preponderance standard is enough to provide equal protection to acquittees.

Appellant has argued that a series of later Supreme Court and circuit court decisions based on an equal protection theory support his entitlement to release as of the expiration of his hypothetical maximum prison term. However, the cases cited by appellant are all distinguishable.

In *Humphrey* v. *Cady*, 405 U.S. 504 (1972), a defendant convicted of contributing to the delinquency of a minor was committed to a "sex deviate facility" in a Wisconsin state prison in lieu of sentence. The statute authorizing such commitment provided an initial term equal to the maximum sentence the defendant could have received, and five-year renewals based on a judge-made finding of dangerousness. The statutory scheme in *Humphrey* clearly included an express punitive element evidenced by the limitation of the initial commitment term to a period corresponding to that applicable to those convicted.[23]

In the same term that it decided *Humphrey*, the Supreme Court held that indefinite confinement of a person charged with a crime and found incompetent to stand trial violated equal protection because the criminal charges were insufficient to prove either that the defendant was dangerous or that he required treatment. *Jackson* v. *Indiana*, *supra*. *Jackson* is inapposite to the instant case because Jackson was never tried for the crime with which he was charged. *See United States* v. *Ecker*, *supra* at 49-51, 543 F.2d at 196-98 (distinguishing *Jack-*

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[23] We disagree with the interpretation of *Humphrey* in *Waite* v. *Jacobs*, *supra* at 287, 475 F.2d at 398, that there is little difference between the position of an acquittee and that of a convicted defendant subject to the Wisconsin statute, since we have determined that there is no punitive element to § 301(d) commitments.

son for same reason in equal protection challenge to § 24-301(e)). Since his continued detention was not based on any other evidentiary predicate of dangerousness, it therefore became invalid after "the reasonable period of time necessary to determine whether there is a substantial probability that [the person held] will attain [the] capacity [to stand trial] in the foreseeable future." *Id.* at 738.

Appellant's reliance on the District of Columbia Circuit cases of *Waite* v. *Jacobs*, *supra*, and *United States* v. *Brown*, *supra*, is also unavailing.[24] Waite was acquitted before the *Bolton* decision and therefore automatically committed after a finding of not guilty by reason of insanity without a judicial hearing on his continued mental illness and dangerousness, which was subsequently required by *Bolton* and codified in § 24-301(d)(2). Waite's commitment was therefore invalid from the beginning and arguably justifiable only as penal detention. As such, it was limited to the applicable maximum sentence period.

Brown was a "post-*Bolton*, pre-1970 amendments" acquittee who challenged the burden of proof at his post-acquittal judicial hearing. The Court of Appeals in *Brown* upheld the preponderance standard applied, justifying the difference in the level of proof vis-à-vis the level of proof required in § 21-545(b) proceedings by the "meaningful elements of responsibility" which an acquittee may have. Insofar as this reasoning suggests a punitive element to § 301(d) we reject it as inconsistent with our finding that the commitment scheme for acquittees is not intended to attribute any guilt or imply any social indebtedness in the excuse of a criminal offense. Therefore, we need not follow the dicta in *Brown* that "[t]he extent of [the commitment] period [justified

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[24] These cases are not formally binding on this court because they were decided after February 1, 1971, the effective date of the District of Columbia Court Reform and Criminal Procedure Act of 1970. *M.A.P.* v. *Ryan*, D.C.App., 285 A.2d 310 (1971).

by a post-*Bolton*, pre-1970 amendments commitment] calls for sound discretion, would take into account, *e.g.*, the nature of the crime (violent or not), nature of treatment given and response of the person, would generally not exceed five years, and should, of course, never exceed the maximum sentence for the offense, less mandatory release time." *Id.* at 408, 478 F.2d at 612. As previously explained, the only factors relevant to release from a mental institution are the acquittee's continued dangerousness and his need for treatment. Judicial limitations on the duration of confinement based on hypothetical prison terms or other arbitrary determinations of a maximum term of hospitalization, as suggested in *Brown*, have no relation to the purpose of the statute. In any event, the need for such limitations has been obviated by the enactment of the 1970 amendments to § 24-301.

For the foregoing reasons, the trial court's order denying appellant's right to immediate release or, in the alternative, civil commitment pursuant to D.C. Code 1973, § 21-545(b) is

Affirmed.

FERREN, *Associate Judge*, with whom NEWMAN, *Chief Judge*, and MACK, *Associate Judge*, join, dissenting: I continue to subscribe to our division opinion on rehearing, 411 A.2d 624 (1980), *vacating* 396 A.2d 183 (1978).

I.

Under the civil commitment process, D.C. Code 1973, §§ 21-541 to -545, the government has the burden of proving a person is mentally ill and dangerous to self or others—and proving it to a jury if the potential commitee so demands. *Id.* § 21-544. In contrast, under the "insane criminal" commitment process, D.C. Code 1973, §§ 24-301 to -303, a defendant acquitted by reason of

insanity has the burden of proving he or she no longer is mentally ill or dangerous—without the right to a jury. *Id.* § 24-301(d)(2).

Our colleagues in the majority conclude that these differences in treatment of two classes of institutionalized persons—commitees and acquitees—do not violate the acquitee's constitutional right to equal protection of the laws. In response to the allegation that the procedural shortcuts in § 24-301 reflect a punitive purpose, in contrast with a wholly therapeutic purpose underlying the civil commitment process, the majority concludes "that there is no basis for finding § 301(d) punitive in any respect." *Ante* at 6.[1]

I do not understand the majority to disagree with the proposition that *if* § 24-301(d) imposes punishment in any respect, the analysis in our division opinion is con-

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[1] The majority maintains that the lesser protections in § 24-301—burden of proof on the acquitee, without right to jury trial—do not alter its equivalence to §§ 21-544 and -545, for the acquitee already has had a right to jury trial on the conduct manifesting insanity, and the shift in burden of proof is justified by a valid evidentiary presumption that the acquitee's insanity at the time of the offense—which he himself asserted—continues to the time of the release hearing. That hearing, therefore, unlike a civil commitment proceeding, is a procedure to update, not initiate, the inquiry.

In our division opinion on rehearing we rejected that analysis. We noted that the presumption of continuing insanity is questionable, spanning as it does months or even years between the time of the offense and the time of the release hearing. Furthermore, we saw that the courts analyzing criminal and civil commitment schemes in other jurisdictions "typically mix evidentiary and punitive rationales in justifying less comprehensive review of acquitees at 'release hearings' than is afforded civil commitees at such proceedings." 411 A.2d at 628-29 (footnote omitted). Differences such as a shift in the burden of proof and withdrawal of the right to a jury are commonly justified, in part, "by the public's interest in greater protection than it would be likely to receive by subjecting acquitees to the civil commitment process." *Id.* at 630. We concluded, therefore, that "the difference[s] between criminal and civil commitment procedures cannot be justified on purely evidentiary grounds." *Id.*

stitutionally sound.[2] It would follow that, "because the maximum possible prison term for which appellant Michael Jones could have been incarcerated has expired, he is entitled to release from St. Elizabeths Hospital, subject to the government's right to seek civil commitment." 411 A.2d at 630.

I therefore propose to discuss in greater detail the determinative issue: whether § 24-301(d) is, to some extent, punitive.

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[2] In our division opinion on rehearing, we summarized our analysis:

> Assuming the best case for the constitutionality of § 24-301(d), appellant argues that its partially punitive character at least dictates, as a matter of equal protection vis-a-vis civil commitees, that acquitees be released (or civilly committed) no later than the end of the maximum prison term they would have received if criminally convicted. We agree.
>
> According to *Baxtrom* [v. *Herold*, 383 U.S. 107, 111 (1966)], "[e]qual protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made" (citation omitted). *Accord, Bolton* [v. *Harris*, 130 U.S.App.D.C. 1, 10, 395 F.2d 642, 651 (1968)]. On the basis of the partially punitive rationale for the criminal commitment scheme set forth earlier, *see* text and cases at note 9 *supra*, the criminal commitment scheme might survive equal protection scrutiny under *Baxstrom*, *supra*, even though the procedure for confining civil commitees provides greater protection for the individual at the outset (the right to a jury and burden of proof on the government). We agree with appellant, however, that there is no basis for confining an acquitee under § 24-301(d) beyond the length of the hypothetical maximum prison term, since that term marks the end of society's claim on that individual for any kind of punishment. Any longer confinement must depend, constitutionally, on a *de novo* civil commitment. *See Humphrey* [v. *Cady*, 405 U.S. 504, 510-11 (1972)]; *Baxstrom*[, *supra* at 110-11]; [*United States* v. *Brown*, 155 U.S.App.D.C. 402, 408, 478 F.2d 606, 612 (1973)].

411 A.2d at 630 (footnote omitted).

II.

The Supreme Court has identified several factors for use in determining whether a statute is punitive. A court first should look for "objective manifestations of congressional purpose." *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 169 (1963). *Accord, Bell* v. *Wolfish*, 441 U.S. 520, 538 (1979). Where it is not clear on the face of the statute whether Congress had a punitive intent, a court must consider a variety of other factors:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. [*Kennedy, supra* at 168-69 (footnotes omitted).]

Accord, Bell, supra at 537-38. In the present case, we confront a statute for which Congress clearly had a punitive purpose.

A. *The Previous Statute and Judicial Construction*

Analysis begins with the previous statute. *See, Kennedy, supra* at 170. Under D.C. Code 1967, § 24-301(d), a defendant who successfully interposed the insanity defense was committed automatically—and indefinitely—to a mental institution. However, in *Bolton* v. *Harris*, 130 U.S.App.D.C. 1, 395 F.2d 642 (1968), the United States Court of Appeals for the District of Columbia Circuit held that automatic commitment of acquitees was unconstitutional—a denial of equal protection vis-a-vis com-

miteees. The court accordingly required that, upon a finding of not guilty by reason of insanity, an acquitee was constitutionally entitled to the equivalent of a civil commitment proceeding, which came to be known as the "*Bolton* hearing." [3] Five years later, in *United States* v. *Brown*, 155 U.S.App.D.C. 402, 408, 478 F.2d 606, 612 (1973), the court held that even after a "*Bolton*" hearing the disparities of treatment were such that "insane criminal" commitment under D.C. Code 1967, § 24-301, having a partially punitive purpose, must be limited to the hypothetical maximum sentence (less mandatory release time), after which the acquitee would be entitled either to release or to a civil commitment proceeding. *Accord*, *Waite* v. *Jacobs*, 154 U.S.App.D.C. 281, 284-85, 475 F.2d 392, 395-96 (1973).

Apropos of *Brown*, the en banc majority concedes in the present case that the prior statute had "punitive aspects," a quality that *Bolton* was necessary to "undo." *Ante* at 7. And yet in the same paragraph the majority states that "[t]he 1970 amendments to § 301(d), enacted in response to" *Bolton*, "have not altered its original purpose," *ante* at 6-7, which the majority—in a nonsequitur—characterizes as nonpunitive by reference to *Hough* v. *United States*, 106 U.S.App.D.C. 192, 271 F.2d 458 (1959) and other pre-*Bolton* circuit court decisions. The majority, therefore, is inherently inconsistent. If, as the majority concedes, the pre-*Bolton* statute was punitive, to the point that *Bolton* was necessary to correct its unconstitutional impact. I do not see how statutory amendments "in response to *Bolton*," providing lesser pro-

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[3] In reaching this result, the court relied on *Baxstrom* v. *Herold*, 383 U.S. 107 (1966), and *Specht* v. *Patterson*, 386 U.S. 605 (1967). The circuit court expressly modified its earlier decisions in *Overholser* v. *O'Beirne*, 112 U.S.App.D.C. 267, 302 F.2d 852 (1961); *Ragsdale* v. *Overholser*, 108 U.S.App.D.C. 308, 281 F.2d 943 (1960); and *Overholser* v. *Leach*, 103 U.S.App.D.C. 289, 257 F.2d 667 (1958), *cert. denied*, 359 U.S. 1013 (1959). *Bolton*, *supra* at 12, 395 F.2d at 653.

tections, can be said automatically to remove the original, "punitive aspects" of that statute. The question remains: do the 1970 amendments modifying *Bolton* erase the punitive purpose of the previous statute?

B. *The Present Statute and Its Construction*

1. Legislative history confirms that, in amending § 24-301(d) in 1970, Congress held on to its original intent to punish the criminal offender, if not by conviction and imprisonment then by indefinite confinement in a mental institution. The overriding concern of the House of Representatives was that *Bolton* "permits dangerous *criminals* . . . 'to have it both ways'—to escape both conviction and commitment to a hospital." HOUSE COMM. ON THE DISTRICT OF COLUMBIA, DISTRICT OF COLUMBIA COURT REFORM AND CRIMINAL PROCEDURE ACT OF 1970, Section 207—*Insane Criminals*, at 74, H.R. REP. No. 91-907, 91st Cong., 2d Sess. (emphasis added) (quoting *Overholser* v. *O'Beirne*, 112 U.S.App.D.C. 267, 276, 302 F.2d 852, 861 (1961). The House considered the possibility that a criminal offender could get off without being either convicted or hospitalized "intolerable." *Id. See United States* v. *Jackson*, 179 U.S.App.D.C. 375, 381-82, 553 F.2d 109, 115-16 (1976).

The congressional intention in drafting the present § 24-301(d), therefore, was "to meet the objections of the *Bolton* court while preserving the principle of the *mandatory commitment* of those who escape criminal responsibility on the ground of mental abnormality." *Bethea* v. *United States*, D.C.App., 365 A.2d 64, 92 n.62 (1976), *cert. denied*, 433 U.S. 911 (1977) (emphasis added). Congress wanted to confront the criminal defendant with a choice: conviction or "the very real possibility of prolonged therapeutic confinement." *Id.* at 90 (footnote omitted). Because "the prospect of commitment to a mental institution for an indefinite period is much less desirable than a fixed term in prison," *United States* v. *Freeman*, 357 F.2d 606, 626 n.60 (2d Cir.

1966), Congress intended the substantial likelihood of indefinite confinement to provide an effective deterrent to those tempted to misuse the insanity defense to avoid criminal incarceration. In short, the legislative history of the 1970 amendments provides strong evidence that Congress, in overruling *Bolton*, intended to restore as much punishment under § 24-301(d) as constitutionally would pass muster.

2. More than the legislative history, the legislative result—the statute itself—reveals that Congress maintained its punishment objective.

First, the authorized procedures by which an acquitee may challenge confinement in a mental institution, D.C. Code 1973, §§ 24-301(d)(2), -(k)(1) through (6), do nothing more than institutionalize the habeas corpus procedure that already was available at the time of *Bolton*. *See Miller* v. *Cameron*, 118 U.S.App.D.C. 323, 324, 335 F.2d 986, 987 (1964); *O'Beirne*, *supra* at 275, 302 F.2d at 860; *Ragsdale* v. *Overholser*, 108 U.S.App.D.C. 308, 313-14, 281 F.2d 943, 948-49 (1960); D.C. Code 1967, § 24-301(g). Procedurally, therefore, the acquitee is no better off under § 24-301 today than he or she was under the same statute before 1970. Unless the acquitee can prove he or she is not mentally ill or dangerous, confinement under § 24-301 is both automatic and indefinite.[4]

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[4] My colleagues' implication that altering the burden of proof and denying acquitees a right to jury trial are minor procedural distinctions from civil commitment, *see ante* at 15-21, is inconsistent with Congress' purpose in amending the statute to overrule *Bolton*. As this court recognized in *Bethea*, *supra*, imposing the burden of proof on the acquitee is a significant procedural distinction from civil commitment; it is designed to make it more difficult for the acquitee to gain freedom. *Id.* at 91-92. Indeed, where proof is often difficult to assess, *see Addington* v. *Texas*, 441 U.S. 418, 429 (1979), "the allocation of the burden of proof may be outcome determinative." *Waite supra* at 284, 475 F.2d at 395.

The majority's discounting of the role of the jury when questions of mental capacity are at issue is also in direct conflict with our ruling in *Bethea*, *supra*, which emphasized that, despite the

Second, upon confinement, acquitees are not necessarily treated the same as commitees. In this jurisdiction, an individual is found not guilty by reason of insanity if "as a result of a *mental disease* or *defect* he lacked substantial capacity either to recognize the wrongfulness of his conduct or to conform his conduct to the requirements of law." *Bethea, supra* at 79 (emphasis added). Ordinarily, this jurisdiction treats individuals suffering from a mental "defect" (*i.e.*, mental retardation) differently from the way it treats individuals suffering from a mental illness. Under civil commitment procedures, a mentally defective individual who is "not insane nor of unsound mind to such an extent to require his commitment to a hospital for the mentally ill" is committed to Forest Haven, a facility for retarded persons. D.C. Code 1973, §§ 21-1101, 32-601. In contrast, an acquitee, even if only suffering from a mental defect, is committed to a hospital for the mentally ill, Saint Elizabeths. *Id.*, § 24-301(d).

In *United States* v. *Jackson, supra*, the court upheld this distinction in treatment precisely because it recognized that Congress "intended that *all* defendants acquitted by reason of insanity should be distinguished from all other persons, including persons civilly committed for mental diseases or retardation." *Id.* at 381, 553 F.2d at 115 (emphasis in original). In *Jackson*, the court justi-

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impact of psychiatric testimony, it is for the jury, not the psychiatric expert, to decide the accused's mental state. *Id.* at 82-83. The majority's emphasis on the factfinder's reliance on expert testimony in accessing the accused's mental state (and thus on the lesser need for a jury) was recently rejected by the United States Court of Appeals for the District of Columbia Circuit in *United States* v. *Ecker*, 177 U.S.App.D.C. 31, 543 F.2d 178 (1976), *cert. denied*, 429 U.S. 1063 (1977). There, the court upheld the trial court's refusal to release an acquitee from a mental hospital despite the recommendations of his doctors, stating, "*the district court must independently 'weigh the evidence' and make a de novo determination* that the patient will not in the reasonable future endanger himself or others." *Id.* at 40, 543 F.2d at 187 (emphasis in the original).

fied this difference in treatment on the basis that acquitees, but for their insanity plea, had been found guilty of crimes against society. *Id.* at 387, 553 F.2d at 121, Apropos of *Jackson*, this difference in treatment of certain acquitees cannot possibly be justified merely on the basis of an evidentiary presumption concerning the continuing mental condition of the acquitee. *See* note 1 *supra*. Rather, it is an express statutory provision, justified by reference to the criminality of the acquitee's prior conduct.

Third, and perhaps most telling, is another example of differing possibilities for release of acquitees and commitees after confinement. When the superintendent of Saint Elizabeths Hospital certifies that a commitee is cured, the individual is discharged from the hospital. D.C. Code 1973, § 21-590. In contrast, when the hospital superintendent certifies that an acquitee has recovered, the government may demand a hearing. At this hearing, if the court is not convinced that the acquitee has recovered, the court may order his or her return to the hospital even though the authorities there consider the individual well enough for release. D.C. Code 1973, § 24-301(e).

In *United States* v. *Ecker*, 177 U.S.App.D.C. 31, 543 F.2d 178 (1976), *cert. denied*, 429 U.S. 1063 (1977), an acquitee challenged the constitutional validity of this added hurdle—court approval—before release. Five years after a jury had found the defendant not guilty of rape and murder by reason of insanity, the superintendent of Saint Elizabeths recommended conditional release. After a hearing, despite the recommendation of the examining psychiatrists, the trial court denied the hospital's request and ordered continued hospital confinement. In upholding the statute and the trial court's decision, the federal circuit court expressly relied on the fact that Ecker had committed a violent criminal act.[5] *Id.* at *52*, 543 F.2d

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[5] The circuit court, more than once, has relied on the nature of the underlying offense to justify the consequences of confinement under § 24-301(d). In *United States* v. *Jackson*, *supra*, the court emphasized that the defendant had been acquitted by reason of

at 199. Whether or not the hospital psychiatrists thought Ecker should be released, the trial court had a duty to protect "the public against whom the acquitee has already been shown to have committed one or more criminal acts, thus differentiating himself from the civil commitee." *Id.* at 51, 543 F.2d at 198. "More importantly," the court rejected Ecker's equal protection argument based on *Jackson* v. *Indiana*, 406 U.S. 715 (1972), *Baxstrom* v. *Herold*, 383 U.S. 107 (1966), and *Humphrey* v. *Cady*, 405 U.S. 504 (1972), reasoning "that the criminal conviction may justify some differences in procedural safeguards if the differences are 'limited by the nature of the defendant's crime *or the maximum sentence authorized for that crime*' " *Id.* at 51-52, 543 F.2d at 198-99 (quoting *Humphrey, supra* at 511) (emphasis added). Because Ecker could have been incarcerated, however, for a life sentence if not acquitted by reason of insanity, the differences in release procedures (between acquitees and commitees) were therefore justifiable. Finally, the court rejected the hospital recommendation by saying that even if the hospital were correct "that a step-by-step reentry into the community [was] essential to Ecker's continued improvement," an acquitee "who has committed violent criminal acts" has "no right to treatment at the community's peril." *Id.* at 52-53, 543 F.2d 199-200.

Given the legislative history, the differences in treatment of acquitees and commitees, and the judicial gloss on the statute by decisions such as *Ecker*, the majority's position that the purpose of the statute is solely to "treat[] and rehabilitat[e] mental patients who happen to have been acquitted of crimes by reason of insanity," *ante* at 10, is unsupportable. Acquitees are not just mental patients "who happen" to have been acquitted of crimes by reason of insanity. The fact of their criminal conduct continues to play a decisive role in the nature of

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insanity of first degree burglary and rape, in contrast with mere theft of small sums which would "not indicate excessive dangerousness." *Id.* at 387, 553 F.2d at 121.

their treatment and their chances for release after initial commitment. Congress and the courts have justified this harsher treatment precisely because acquitees have committed crimes.

C. *The Relevance of the Statutory Maximum Sentence*

The majority rejects the use of statutory maximum sentences to determine the maximum length of confinement under § 24-301 because such maximums have "no relationship to the purposes of mental care and treatment." *Ante* at 8. I agree. The majority states that "[t]he notion that the duration of an acquitee's hospitalization can be established by statute or court order ignores the most basic precepts of medicine and psychiatry. . . ." *Ante* at 10. Again, I agree. If the acquitee were hospitalized solely for medical reasons, I would be the first to concur that a statutory maximum for confinement based on the nature of the acquitee's criminal conduct would have no relevance or application. But the problem is—and is so clearly evident in *Ecker*—that acquitees are not confined to mental institutions for medical reasons alone. They are confined there in part because society is unwilling to allow those who have committed crimes to escape without paying for their crimes. The intent of the statute is partially punitive, and thus the procedures under § 24-301 reflect this added burden on the defendant. Because of this punitive purpose, the maximum statutory period of confinement becomes relevant, for at that point society no longer has a valid interest in continued confinement on the basis of a shortcut procedure. *Brown*, *supra* at 408, 478 F.2d at 612; *see Waite*, *supra* at 285, 475 F.2d at 396; note 2 *supra*.[6]

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[6] Although the foregoing discussion is sufficient to demonstrate the congressional purpose underlying D.C. Code 1973, § 24-301, I note briefly that the other *Kennedy* factors confirm the punitive intent.

By definition, confinement to a mental institution is "an affirmative disability or restraint," *id.* at 168, even more perhaps than

III.

Society's right to punish Michael Jones for his first offense, a misdemeanor—stealing a coat—has long since expired. As every day passes he is denied equal protection of the laws.[7] Michael Jones should be released unless civilly committed.

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imprisonment, *see Vitek* v. *Jones*, 445 U.S. 480, 493-94 (1980), given the indefinite duration and the stigma. *See Addington*, *supra* at 425-26. Despite its use for treatment, moreover, confinement for mental illness and dangerousness as a consequence of a criminal act "has historically been regarded as a punishment," *Kennedy*, *supra* at 168, for which the Supreme Court continually has had to write constitutional guidelines. *See, e.g., Jackson* v. *Indiana*, *supra*; *Humphrey*, *supra*; *Specht*, *supra*; *Baxstrom*, *supra*.

Criminal confinement also comes into play "only on a finding of *scienter*," *Kennedy*, *supra* at 168; *see Bethea*, *supra* at 94, and "the behavior to which it applies is already a crime," *Kennedy*, *supra* at 168, by virtue of the criminal conviction that precedes it. The statute also "promote[s] the traditional aims of punishment—retribution and deterence," *id.*, for, as already indicated, Congress and this court have noted a desire to prevent the misuse of the insanity defense by making the consequences more severe than *de novo* civil commitment. In addition, criminal confinement at a mental institution serves other goals of punishment, incapacitation and rehabilitation. *See United States* v. *Brown*, 381 U.S. 437, 458 (1965) ("Punishment serves several purpose: retributive, rehabilitative, deterrent—and preventive"). *See generally* J. VORENBERG, CRIMINAL LAW & PROCEDURE 44-57 (1975).

Finally, for reasons already discussed, I do not believe there is a wholly nonpunitive, "alternative purpose," *Kennedy*, *supra* at 168-69, assignable to § 24-301; but even if the purposes assigned by the majority—treatment of the acquitee and protection of society—were altogether nonpunitive, the indefinite confinement of Michael Jones for stealing a coat is well beyond any public protection gloss on the statute's purpose. It is one thing to keep an acquitee of murder and rape confined for life, *see Ecker*, *supra*, as he would be under appellant's theory here, for those are life-sentence crimes. But society has no "protection" interest in confining Michael Jones indefinitely for stealing a coat, a misdemeanor punishable by maximum confinement for one year.

[7] When a court confronts different procedural safeguards afforded to different classes of individuals committed to mental institutions,

SUPREME COURT OF THE UNITED STATES

No. 81-5195

MICHAEL JONES, PETITIONER

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted.

January 11, 1982

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concerns of equal protection and due process become interrelated. *See Jackson* v. *Indiana*, *supra* at 731; *cf. Humphrey*, *supra* at 511 (1972) (noting with favor the state court's consideration of Equal Protection Clause as relevant to procedural due process analysis); *Specht*, *supra* at 608 (commitment proceedings for sex offenders subject both to Equal Protection and Due Process Clauses). In evaluating equal protection for the acquitee, I have not reached the question of due process as an independent concern, although there is a serious question here. I note, moreover, that any effort to reduce the procedural safeguards afforded to civil commitees, while possibly resolving equal protection problems, would raise serious questions of due process for that class of individuals.

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No. 81-5195

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MICHAEL JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a criminal defendant found not guilty by reason in insanity of attempted petit larceny—a misdemeanor—can, consistent with due process, be confined indefinitely to a mental hospital on the basis of that finding alone.

2. Whether a criminal defendant found not guilty by reason of insanity is denied equal protection of the laws by confinement in a mental hospital, without the benefit of procedural protections available to civil commitees, for longer than he could have been incarcerated upon conviction.

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JURISDICTION

The judgment of the court of appeals sitting *en banc* was entered on May 29, 1981, and the petition for a writ of certiorari was filed on August 6, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall . . . be deprived of life, liberty, or property without due process of law . . . .

24 D.C. Code §301(d) and 21 D.C. Code § 545(b):

These provisions are set forth in footnotes 1 and 2 of the *en banc* opinion of the court of appeals, which was reproduced in Appendix A of the petition for a writ of certiorari.

STATEMENT OF THE CASE

Petitioner was arrested on September 19, 1975, and arraigned the following day in the Superior Court of the District of Columbia on a charge of attempted petit larceny for trying to steal a coat from a Washington, D.C. department store. Under District of Columbia law, the offense was a misdemeanor, carrying a maximum jail sentence of one year. 22 D.C. Code § § 103, 2202. On September 22, he was ordered to St. Elizabeths Hospital, a public mental hospital, for a mental examination. After a three and one-half month delay, during which Mr. Jones was confined to the District of Columbia Detention Center pending availability of space at the hospital, he was transferred to St. Elizabeths, where he remained for about one month. On March 12, 1976, Mr. Jones appeared in court for trial. Dr. David Shapiro, a clinical psychologist from the hospital, testified that Mr. Jones was competent for trial but that, on the date of the offense, he was suffering from a mental disease that substantialy impaired his behavior controls and that the offense was the product of this mental disease. In an uncontested proceeding before a judge of the Superior Court, petitioner was then found not guilty by reason of insanity of attempted petit larceny. Pursuant to the automatic commitment provision of 24 D.C. Code § 301(d)(1), petitioner was recommitted to St. Elizabeths Hospital for further evaluation, and a hearing was scheduled under that sub-section to afford petitioner an opportunity to demonstrate his eligibility for release.

After a series of continuances, that hearing went forward on May 25, 1976. Dr. Gertrude B. Cooper, another clinical psychologist from the hospital, testified concerning petitioner's condition. She related that the Occupational Therapy Section at the hospital had informally offered an evaluation:

> They found that Mr. Jones is quiet, that he responds to other people both patients and staff. He does not initiate contact. That he tends to be by himself. That he carries out projects in an acceptable fashion.

(Tr. 5/25/76, at 7).[1] Dr. Cooper added, however, that he did not consistently accept others' advice. Once, for example, he disregarded a staff suggestion that he apply lacquer to a copperwork project that he had fashioned, and this "caused the therapy assistant some anxiety." *Id.* Nonetheless, according to Dr. Cooper:

> He does want to recover. He does ask for suggestions as to what he might do and we feel he is positively motivated.

Id.

He sometimes experienced hallucinations and was receiving medication, *id.* at 8, but, she said:

> Well, pretty much all of us have agreed that he is very self-[effacing] individual [sic] and no one really gets to know him very well. He does not create any problems. He doesn't get into any difficulty but he also does not lead to active [sic] social life. He is not a very active participant in the informal activities on the Ward. The patients play cards, play pool, do things like that. He keeps to himself more.

Id. at 8-9. She concluded, also, that he would pose a danger if released.[2]

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[1]This transcript, which was not included in the record before the court of appeals, has been lodged with the Clerk of this Court.

[2]On cross-examination, Dr. Cooper explained (Tr. 5/25/76 at 10-11):

> Q. . . . Is he a danger to the community? I think that is what we are most interested in.
>
> A. Yes, I think so. I think if indeed his attempted assault was—was the product of his illness. He is still likely to do the same thing again; the attempted larceny. *(continued)*

On the strength of this testimony, the trial court concluded that Mr. Jones had not sustained the burden that the statute placed upon him, and it ordered him recommitted to the hospital.

At a later hearing held pursuant to the petitioner's request, through new counsel, for release under 24 D.C. Code § 301(k), the petitioner argued that the due process clause of the Fifth Amendment, and the equal protection principle implicit in it, required his release unless he was afforded a new commitment hearing with the protections available to prospective civil commitees since he had already been confined longer than would have been possible had he been convicted, rather than acquitted by reason of insanity. After a further hearing held on February 22, 1977, the Superior Court denied his request, and petitioner appealed to the District of Columbia Court of Appeals.

Mr. Jones argued to the court of appeals that his confinement was unconstitutional. A three-judge panel, in an opinion reported at 396 A.2d 183 (1978), initially ruled against his claim, but the panel granted petitioner's request for rehearing. In a second opinion reported at 411 A.2d 624 (1980), the panel, by a two-to-one vote, sustained his contention that his continued forcible hospitalization denied him rights secured under the Fifth Amendment due process clause unelss he was afforded a hearing that was substantially equivalent to a civil commitment proceeding. The government.

(footnote continued from preceding page)

Q. Attempted assault or was it attempted larceny?

A. I believe it was larceny.

Q. You don't know?

A. Well, I was not involved in his trial. I'm simply saying based on what I recall of the record, he is likely to repeat the same activity either way.

then successfully petitioned the court of appeals for rehearing *en banc*, and the court, sitting *en banc*, again reversed itself. With three judges dissenting, it held that the petitioner's commitment could constitutionally continue indefinitely subject only to his right to secure his release by affirmatively demonstrating by a preponderance of the evidence that he was not mentally ill or dangerous. On January 11, 1982, this Court granted certiorari.

SUMMARY OF THE ARGUMENT

Petitioner's continuing confinement, despite the fact that his mental illness and dangerousness have never been demonstrated by clear and convincing evidence as required in civil commitment proceedings by this Court's decision in *Addington v. Texas*, 441 U.S. 418 (1979), is a denial of due process of law. The predicate for petitioner's indefinite commitment has never been established with the constitutionally required degree of certainty. Moreover, petitioner's trial, which resulted in a verdict of not guilty by reason of insanity of attempted petit larceny, cannot substitute for a hearing that conforms with *Addington*. The issues at petitioner's trial were substantially different from the issues at the hearing that culminated in his indefinite commitment to a mental hospital, and, at all events, mental illness was established only under a lower standard of proof. Nor can the finding of insanity at that trial create a "presumption" that can validly excuse the failure to afford petitioner a hearing that complies with *Addington*. Saying that a presumption of insanity emanated from petitioner's criminal trial, so that otherwise necessary procedural protections could be dispensed with, merely

argues with different language the point just discussed. A presumption of this sort also conflicts with the teachings of *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979), and *Ulster County Court v. Allen*, 442 U.S. 140, 167 (1979), that a mandatory presumption (which the presumption here would be), even if rebuttable, is invalid if it undermines a constitutionally required burden of persuasion.

To the extent that the provisions for commitment of persons found not guilty by insanity in the District of Columbia may legitimately serve a purpose that is not implicated in civil commitment proceedings, that purpose was fully served by the time that petitioner had served a year in the hospital. For by then he had been confined as long as he could have been had he been convicted. In 1970, Congress made it more difficult for a defendant to win an acquittal by reason of insanity, and it made it more difficult for a defendant who nonetheless prevailed to avoid commitment to a mental hospital afterwards. Congress' purpose was to reduce the likelihood that a person who had committed a criminal act could avoid confinement by taking advantage of the gap that separated the burden of proof by which the government, before 1970, had to demonstrate a defendant's sanity once the defense was properly raised, and the burden by which, if the government failed, it then had to show that the insanity acquitee should be committed. Congress' principal worry was that a person who was not truly insane could nonetheless raise a reasonable doubt as to his sanity and thereby avoid conviction. The government was, Congress feared, then unlikely to be able to prove affirmatively that such a person should be committed. Consequently, he would escape all confinement, although he should have been sentenced to a term in prison.

Such a danger has been altogether avoided in petitioner's

case, because he has already been confined for longer than the one year he could have served if his insanity defense had failed. Consequently, no reason remains to deny him the protection *Addington* requires.

Analogous reasoning leads to the conclusion that, on equal protection grounds, petitioner is entitled to the safeguards provided in civil commitment proceedings in the District of Columbia, including the right to trial by jury. After his completion of a year's confinement in the hospital, no distinction remained that could justify treating petitioner differently from a civil commitee. Application of the principles developed in such cases as *Baxstrom v. Herold*, 383 U.S. 107 (1966), and *Jackson v. Indiana*, 406 U.S. 715 (1972), to this case leads to the conclusion that petitioner must be released unless a present basis for commitment can be established in proceedings that conform in all substantial respects with ordinary civil commitment proceedings.

ARGUMENT

I.

PETITIONER'S CONTINUED CONFINEMENT, WHICH HAS NOW EXTENDED LONG BEYOND THE PERIOD HE COULD HAVE BEEN CONFINED UPON CONVICTION, IS A DENIAL OF DUE PROCESS, FOR THE GOVERNMENT HAS NEVER ESTABLISHED THE PREDICATE FOR THAT CONFINEMENT—PETITIONER'S MENTAL ILLNESS AND RESULTING DANGEROUSNESS—BY THE CONSTITUTIONALLY REQUIRED STANDARD OF CLEAR AND CONVINCING EVIDENCE.

A. *Due Process Requires That The Need For An Indeterminate Involuntary Commitment Be Demonstrated By Clear And Convincing Evidence.*

In *Addington v. Texas*, 441 U.S. 418 (1979), this Court unanimously held that, before an individual could be committed indefinitely to a mental institution, the basis for the commitment must be established by clear and convincing evidence. It held, therefore, that a Texas commitment scheme, which permitted the indeterminate confinement of persons deemed mentally ill and dangerous, could be constitutionally implemented only if the putative commitee's illness and dangerousness were proved under this standard. The Court in *Addington* recognized that the government's interest in confining a person whose mental illness makes him dangerous to himself or others is a weighty one, and that an erroneous decision not to commit such a person not only deprives him of potentially beneficial treatment, but may also jeopardize the public safety. Nevertheless, the Court concluded, the state must prove the need for commitment by clear and convincing evidence because the individual's liberty interest is of such "weight and gravity" that "the individual should not be asked to share equally with society the risk of error." *Id.* at 427. The Court declined to require proof of committability beyond a reasonable doubt because it thought the existence of mental illness was not an issue susceptible to such an exacting standard of proof, and because the risk of an erroneous commitment was tempered by the existence of procedures to review the continuing need for a patient's commitment.

These same considerations apply with equal force where, as here, the government seeks an *indefinite* commitment to a mental hospital following a finding of not guilty by reason of

insanity.[3] To the extent that Congress' purposes in providing for the commitment of persons found not guilty by reason of insanity are the same as for civil commitees—to provide for the confinement and treatment of mentally ill and dangerous persons—then the analysis of *Addington* applies per force here.[4] And the result should be the same: to satisfy due process standards, the government must demonstrate by clear and convincing evidence that the insanity acquitee is mentally ill and dangerous to himself or others as a result of that illness.

But Congress has asserted another interest here, the validity of which is not at issue in this case. As the legislative history of the present sections 301(d), (e) and (j) makes clear, Congress established the standards that presently control insanity trials, commitment hearings, and release proceedings to curb what it perceived as abuses of the insanity defense. It clearly sought to minimize the possibility that criminal defendants would escape confinement in either a prison or a hospital despite their blameworthiness or dangerousness. The House report conveys this purpose in no uncertain terms:

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[3]We emphasize the word "*indefinite*" here to highlight that the issue raised by this case is an exceedingly narrow one. The issue is not the legality of petitioner's automatic commitment under 24 D.C. Code §301(d) following his acquittal by reason of insanity. That initial confinement need not, for purposes of petitioner's argument, be viewed as an indefinite one subject to *Addington* standards. But once the commitment extended beyond the maximum one year term which could have been imposed upon petitioner's conviction, it became an indefinite commitment, the need for which must be demonstrated by clear and convincing evidence.

[4]That this was clearly one of Congress' purposes in providing for an automatic commitment following an insanity acquittal is evident from the fact that it provided for the release of insanity acquitees who are not mentally ill and dangerous. *See* 24 D.C. Code §301(e).

> [D]angerous criminals, particularly psychopaths, [are able] to win acquittals of serious criminal charges on grounds of insanity by raising a mere reasonable doubt as to their sanity and then to escape hospital commitment because the government is unable to prove their insanity following acquittal by a preponderance of the evidence. The result is a revolving door which . . . allows defendants "to have it both ways" . . . The Committee considers this result intolerable.[5]

To this end, the legislature closed the gap that had previously separated the applicable burden of proof at the trial and at subsequent release proceedings. In so doing, Congress sought to place upon the defendant the risk of erroneous resolution of the issue whether he should be released, once it has been proved beyond a reasonable doubt that he committed a criminal act. In section 301(d), it placed the burden on the insanity acquitee to demonstrate by a preponderance of the evidence his eligibility for release, while previously the burden had fallen upon the government to show that the acquitee should be committed. *Bolton v. Harris*, 130 U.S. App. D.C. 1, 395 F.2d 642 (1968).[6] Simultaneously, in section 301(j), Congress required the defendant at his criminal trial to prove his insanity by a preponderance of the evidence, while before 1970 the government was required to

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[5]H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 74 (1970).

[6]Congress in 1955 provided for the automatic commitment of insanity acquitees. *See Bolton v. Harris, supra*, 130 U.S. App. D.C. at 6-7, 395 F.2d at 648-49. In *Lynch v. Overholser*, 369 U.S. 705 (1962), this Court construed the automatic commitment provision as not applying to the insanity acquitee who did not himself raise the defense, and in *Bolton*, the court of appeals held that principles of equal protection required reading the pre-1970 and post-1955 section 301(d) as requiring a pre-commitment hearing substantially similar to the hearing required in civil commitment proceedings.

prove sanity beyond reasonable doubt. *Davis v. United States*, 160 U.S. 469 (1895). These two means were aimed at the common goal of eliminating any possibility that a defendant who committed the charged offense would erroneously avoid confinement, whether in jail or in a hospital. Together, they reallocated from society to the defendant the risk of error on the question of the defendant's release or confinement.[7] Whether principles of due process or equal protection permit the assignment of these risks to the defendant in order to minimize the risk of an erroneous decision to release need not be answered in this case. Here, Congress' legitimate interest in reallocating the risks of error is fully vindicated because the insanity acquitee has already served as long a period in therapeutic confinement in a mental hospital as he could have served in prison.[8] Consequently, at this point, the validity of his continuing confinement must be proved by the standards required in *Addington*.

Petitioner does not challenge Congress' power to require an insanity acquitee, rather than society, to bear the risk of erroneous commitment during the period which the acquitee could have been incarcerated upon a finding that he was

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[7]By adjusting the burdens as it did, Congress, of course, substantially increased the risk of an erroneous decision to confine (or to confine in prison a defendant who should have been confined in a hospital).

[8]The petitioner here has already been confined far longer than he could have been confined upon conviction, even if the maximum sentence had been imposed. Consequently this case does not raise the issue of how long the defendant acquitted by reason of insanity of an offense carrying a very long maximum sentence could be confined without proof of committability. The United States Court of Appeals for the District of Columbia Circuit has spoken to this issue in several panel opinions. *Compare United States v. Brown*, 155 U.S. App. D.C. 402, 408, 478 F.2d 606, 612, (1973) *with United States v. Ecker*, 177 U.S. App. D.C. 31, 52, 543 F.2d 178, 199 (1976), *cert. denied*, 429 U.S. 1063 (1977).

responsible for his acts; for while the commitment and release hearing at which the acquitee must prove that he is not mentally ill or dangerous may well result in an erroneous determination of committability,[9] he may also have been erroneously acquitted by reason of insanity. Through one means or another—imprisonment after conviction or confinement after acquittal by reason of insanity—the public is entitled to a measure of protection from someone who has been shown to have committed a criminal act. But even if these interests provided a constitutional basis for the initial commitment, that commitment cannot "constitutionally continue after that basis no longer exist[s]." *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975). Where, as here, the

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[9]The possibility of error here is a very real one. This Court recognized in *Addington* that commitment proceedings necessarily involve complex and inherently fallible psychiatric diagnoses as well as inherently uncertain predictions about future conduct. 441 U.S. at 429. Thus, even leaving aside the issue of the *standard* of proof, a substantial risk of error is borne by whichever party carries the *burden* of proof. *See Speiser v. Randall*, 357 U.S. 513, 525-26 (1958). As the District of Columbia Circuit put it, "in cases concerning psychiatric testimony, which is 'often unclear, sometimes woefully muddled" the allocation of the burden of proof can be outcome determinative." *Waite v. Jacobs*, 154 U.S. App. D.C. 281, 284, 475 F.2d 392, 395 (1973) (quoting *United States v. Leazer*, 148 U.S. App. D.C. 356, 358, 460 F.2d 864, 866 (1972). Indeed, this Court has held that even a prisoner serving a term of imprisonment has a liberty interest sufficient to entitle him to a hearing at which the government must prove present mental illness before involuntary transfer to a mental hospital. *Vitek v. Jones*, 445 U.S. 480 (1980). Petitioner's own case demonstrates vividly the importance of the burden of proof. When the panel of the District of Columbia Court of Appeals reversed itself and ordered that the government either proceed with civil commitment proceedings or release the petitioner, the government apparently felt that it would be unable to prove that petitioner was committable when it declined to initiate civil commitment proceedings after the court of appeals' second panel decision. By the same token, the petitioner has been unable to prove that he should be released.

acquitee has already been confined longer than he could have been incarcerated upon conviction—in this case almost seven times longer—the public has obtained even greater protection against the acquitee's potential dangerousness than it would have had if his insanity defense had failed. Thus, after one year, the risk of error for an erroneous indeterminate commitment must be borne by the government. For after that time has passed, the balance of individual and social interests at stake is precisely the same as it was in *Addington*, and the risk of error must be allocated accordingly. As this Court put it in *Addington*, "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." 441 U.S. at 427. In petitioner's case, society has not been victimized by the revolving door that Congress was worried about when it amended 24 D.C. Code § 301. Instead, petitioner has been the hapless victim of a door that has been wedged shut. If the government wishes to continue his confinement, it must now prove the need for it.

B. *Petitioner's Criminal Trial, At Which He Was Acquitted By Reason Of Insanity, Cannot Substitute For a Commitment Hearing Which Would Justify An Indefinite Commitment.*

Petitioner has argued that before he can be committed indefinitely to a mental hospital the government must prove the need for such a commitment by clear and convincing evidence. The government's response to this argument seems to be that the petitioner's criminal trial, at which he was acquitted by reason of insanity, is functionally equivalent to, or can somehow substitute for, a hearing at which the government proves the need for an indefinite commitment.

But the issue of criminal responsibility at trial was significantly different in several crucial respects from the issue of whether he can be committed indefinitely as mentally ill and dangerous. Thus the petitioner's trial was not a constitutionally adequate hearing to justify an indefinite commitment.

To begin with, petitioner's trial cannot substitute for a constitutionally adequate hearing because petitioner proved mental illness at trial by a mere preponderance of the evidence, the lowest burden of proof known to our law, while in *Addington* this Court mandated a substantially higher standard. The one cannot substitute for the other. Moreover, a mental illness that sufficed to excuse petitioner from blame for trying to steal a coat on one particular occasion could well be too insubstantial for commitment to be appropriate, even if it had been established beyond all doubt that petitioner was suffering from that illness. As the District of Columbia Court of Appeals has itself acknowledged in other cases, the fact-finder's determination of the issue of the defendant's insanity at a criminal trial is ultimately not a medical conclusion, but "a social or moral judgment" about whether "a man should . . . or should not be held accountable" for his alleged crime. *Bethea v. United States*, 365 A.2d 64, 76 (D.C. 1976); *see also United States v. Freeman*, 357 F.2d 606, 619-20 (2d Cir. 1966). The ultimate question at trial is blameworthiness. Where, as here, the offense charged is itself among the less reprehensible acts that are punishable as crimes, the fact-finder will be more likely to excuse the actor on account of an illness than if, as a result of the same illness, the defendant had committed a violent crime. Similarly, because the fact-finder in a civil commitment proceeding must satisfy itself that the illness is sufficiently grave as to justify involuntary, indeterminate confinement, a mental illness that serves to excuse an attempted petit larceny could well be deemed insufficiently serious as to warrant that commitment.

Finally, the issue at trial was not, of course, the defendant's mental condition at the time of trial, but his condition at the time of the offense. The defendant's claim that he should not be held accountable for trying to steal the coat was in no way an assertion about his mental condition at the time he presented his defense.[10] To prevail on an insanity defense, the defendant's illness need not linger past the day of the offense. In contrast, the issue in commitment proceedings is present illiness, and a decision to commit reflects a prediction that the illness will persist.

Thus the criminal trial, even one at which the defendant must prove his past mental illness as an affirmative defense, does not establish present mental illness by clear and convincing evidence, the predicate which *Addington* requires for an indeterminate commitment.

The petitioner's trial also failed to establish the requisite showing of dangerousness, for proof of a single act of attempted petit larceny is by no means equivalent to proof that the accused "is likely to injure himself or other persons" as is required for civil commitment under 21 D.C. Code §545(b). The issue is not, as the court of appeals erroneously conceived it, whether proclivity to theft, a non-violent crime, is as a categorical matter inadequate to satisfy the danger element of the commitment standard. Petitioner is not arguing that future danger to others' property is necessarily insufficient. But to begin with, one effort to steal a coat, standing alone, in no way proves that the unsuccessful thief, even if insane, is likely to repeat his conduct in the future. Indeed, the available evidence fails to establish that those acquitted by reason of insanity are more dangerous or likely to repeat

[10]Indeed, petitioner was considered well enough by the time of trial to participate competently in the proceedings against him.

criminal conduct than those that are convicted. *See* Burt, *Of Mad Dogs and Scientists: The Perils of the "Criminal-Insane,"* 123 U. Pa. L. Rev. 258, 262 (1974), and sources cited therein. At all events, a rational decision whether to commit or not is impossible unless the fact-finder considers both the gravity of the threatened harm as well as the likelihood that the harm will come about. Because minor property offenses are surely on the lower end of the spectrum of threatened harms, a comparatively high likelihood of repetition would have to be shown to justify commitment. Proof—even beyond a reasonable doubt—that at one particular time and place petitioner tried to steal a coat from a store cannot by itself answer this far more difficult question. Indeed, in *Addington* itself, the petitioner did not contest the fact of past assaultive conduct. All that Addington "attempted to show was that there was no substantial basis for concluding that he was probably dangerous to himself or others." 441 U.S. at 421. Despite the uncontested issues, this Court ruled that the state has to prove probable dangerousness by clear and convincing evidence.

Commission of one offense, therefore, simply does not demonstrate future dangerousness, although the offense would certainly be relevant to the latter determination, and, at least where violent conduct was involved, would doubtless go a long way toward convincing the fact-finder that the government had met its burden of proving committability. *See Specht v. Patterson*, 386 U.S. 605, 608-10 (1967). But even if proof of a single criminal act did show dangerousness, the government cannot compensate for deficiencies in its proof of one element of its case with the fact that it has proved even more than it had to with respect to another element. Just as every element of a criminal offense must be proved beyond a reasonsable doubt, *In re Winship*, 397 U.S. 358 (1970), so

each of the prerequisites for an indeterminate commitment must be proved by clear and convincing evidence. Thus, the fact that the government proved beyond a reasonable doubt that the petitioner attempted to steal a coat cannot, even if this established dangerousness, justify an indeterminate commitment without proof of mental illness by clear and convincing evidence.[11]

C. *The Government Cannot Rely On Presumptions Of Continuing Insanity And Dangerousness Arising From Petitioner's Acquittal By Reason Of Insanity To Justify Abbreviated Commitment Proceedings.*

Both the court of appeals in its *en banc* opinion, and the government in its opposition to the petition for certiorari, argue that a presumption of continuing insanity or dangerousness justifies the "abbreviated" commitment proceedings that were held in this case. This argument is but an indirect way of saying that the findings at the criminal trial itself can in some substantial measure substitute for constitutionally required commitment proceedings. Draping this argument in the verbal garb of "presumptions" cannot cloak its constitu-

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[11]The government, in its opposition to the petition for certiorari, mistakenly asserts that there was affirmative proof of a sort, in the form of a letter from St. Elizabeths Hospital to the court. The letter in fact had no independent evidentiary significance at petitioner's hearing under section 301(d). And though it may have proved something about the witness' competence, no one could contend, without blushing, that the testimony adduced at that hearing, which consisted solely of the testimony of a psychologist from St. Elizabeths Hospital, proved anything whatever about the petitioner, except that he prefers his copperwork unvarnished. *See supra* p. 3. At all events, there never has been a judicial finding by clear and convincing evidence that petitioner is mentally ill and dangerous.

tional infirmities. As petitioner has argued, his trial was a constitutionally inadequate prelude to an indeterminate involuntary commitment simply because proof that he once tried to steal a coat does not establish present dangerousness by clear and convincing evidence, and because proof of past mental illness by a preponderance of the evidence does not establish present mental illness by clear and convincing evidence. The presumptions which the goernment cobbles up here cannot be made to do the work of constitutionally required factual proof. It would be as though in a criminal trial the jury was instructed that it should "infer" that the government had proved an element of the offense beyond a reasonable doubt from the fact that it had proved it by a preponderance of the evidence.

This Court has addressed the issue of when a presumption violates due process in several recent decisions. The presumption here—of the mandatory, rebuttable sort—is analogous to the presumptions held unconstitutional in *Mullaney v. Wilbur*, 421 U.S. 684, 703-04 (1975), and *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979). In those cases, mandatory rebuttable presumptions that applied at criminal trials were struck down on the ground that they compromised the reasonable doubt standard by shifting the burden of persuasion on an element of the offense. So, too, here, the presumption relied on by the court of appeals relieved the government of its constitutionally mandated burden to prove petitioner's committability by clear and convincing evidence.

In *Ulster County Court v. Allen*, 442 U.S. 140 (1979), this Court said that a mandatory, rebuttable presumption could survive due process scrutiny in a criminal case only if "the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt." *Id.* at 167. Here, as we have

argued, the facts established at petitioner's trial cannot support a "clear and convincing" inference that he was both mentally ill and likely to injure himself or others at the time of his section 301(d) hearing, when he had an opportunity to rebut the presumption. *See supra* at pp. 13-17. The lower court simply applied the wrong standard when it concluded that "the continuation of these attributes [mental illness and dangerousness] is a rational and permissible evidentiary presumption," 432 A.2d at 374, for rationality is the test for a permissive, rather than a mandatory, presumption. *See Ulster County Court v. Allen*, *supra*, 442 U.S. at 157.[12]

II.

PETITIONER'S CONTINUED COMMITMENT IN THE ABSENCE OF THE PROTECTIONS AFFORDED IN CIVIL COMMITMENT PROCEEDINGS VIOLATES HIS RIGHT TO EQUAL PROTECTION OF THE LAWS.

Petitioner's indefinite commitment to St. Elizabeths Hospital, for longer than the maximum prison term he could

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[12]The presumption here fails even the rationality test. Proof that petitioner attempted to steal a coat because of a mental illness, without more, cannot permit one to predict "with substantial assurance" that it was more likely that not that, at the time of petitioner's section 301(d) hearing, he would injure himself or others if released. *See Leary v. United States*, 395 U.S. 6, 36 (1969). Thus even on the court of appeals' own analysis, the constitutionality of confining petitioner indefinitely to St. Elizabeths Hospital cannot be salvaged by resort to the language of presumptions.

have served upon conviction, denies him equal protection of the laws.[13] This confinement, which is "a massive curtailment of [petitioner's] liberty," *Humphrey v. Cady*, 405 U.S. 504, 509 (1972), purportedly rests on the same substantive basis as a civil commitment,[14] yet petitioner has never been afforded important procedural protections that are extended as a matter of right to civil commitees. This disparity in treatment, whether justified or not at the initial commitment stage, bears no rational relationship to a legitimate state goal once an acquitee has been confined in the hospital for as long as he could have served in jail had he been found criminally responsible for his acts.

A. *There Are Important Procedural Differences In The Treatment Of Acquitees and Commitees.*

The acquitee is treated more harshly than the commitee in several respects. First, the commitee, but not the acquitee, may demand a jury trial on the issue of his committability. *Compare* 21 D.C. Code §544 *with* 24 D.C. Code §301(d).

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[13]The right to equal protection is implicit in the due process clause of the Fifth Amendment. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (per curiam); *Weinberger v. Wiesenfield*, 420 U.S. 636, 638 n.2 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

[14]Section 21-545(b) of the District of Columbia Code establishes a two-prong test for civil commitment: whether a "person is mentally ill and, because of that illness, is likely to injure himself or other persons." Section 24-301(d) mentions only entitlement to release, without defining any standard, but the court of appeals construed section 301(d) as embodying the identical substantive standard as its civil counterpart. 432 A.2d at 372 & n.16. Moreover, 24 D.C. Code §301(e) clearly implies that mental illness and dangerousness are the substantive standards for the commitment of insanity acquitees.

Though the court of appeals dismissed the absence of a jury trial right as "an insubstantial difference,"[15] this Court in *Humphrey v. Cady* confirmed the importance of the jury's role in the commitment determination:

> [T]he jury serves the critical function of introducing into the process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment.

405 U.S. at 509.

In addition, the acquitee has been committed without proof of committability by clear and convincing evidence as is required in a civil commitment hearing. *In re Nelson*, 408 A.2d 1233, 1236 (D.C. 1979). Indeed, unlike the civil commitee, the acquitee himself bears the burden of proving that he is not mentally ill or dangerous. 24 D.C. Code §301(d)(2)(B). This difference may well determine whether the person is committed. *See supra* p. 12 & n.9.

Finally, the acquitee faces far more onerous procedures to obtain release from confinement than are imposed on the commitee. When the superintendent of St. Elizabeths Hospital certifies that a commitee is cured, the individual must be discharged. 21 D.C. Code §548. In contrast, even when the superintendent certifies that an acquitee has recovered, the statute requires a hearing if either the government or the trial

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[15]432 A.2d at 374. The court reached this conclusion by reading *Addington v. Texas* as defining the issue in a commitment proceeding to be dependent upon the expert testimony of psychiatrists and psychologists. *Id.* The court, however, failed to note that *Addington* makes no reference to jury trials; in that case the emphasis on the need for expert testimony went solely to the issue of the standard of proof. Thus, the conclusion of the court of appeals that the jury trial is not "as meaningful" is in no way compelled or even suggested by *Addington*.

judge wants one. And after the hearing, the court may prohibit release even if the medical testomony unanimously supports it.[16]

B. *There Is No Rational Basis For Imposing Upon Petitioner Different Procedural Requirements From Those Imposed Upon Civil Commitees.*

District of Columbia law, then, withholds from the insanity acquitee important procedural protections afforded the putative civil commitee. Numerous commentators[17] and courts[18] have suggested that because involuntary commitment involves deprivation of the fundamental right to liberty, such differences are invalid unless they survive strict judicial scrutiny.

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[16]24 D.C. Code § 301(e); *see United States v. Ecker*, 177 U.S. App. D.C. 31, 34-35, 543 F.2d 178, 181-82 (1976) (trial court judge denied release despite recommendation of hospital psychiatrists), *cert. denied*, 429 U.S. 1063 (1977).

[17]*See, e.g.*, German & Singer, *Punishing the Not Guilty: Hospitalization of Persons Acquitted By Reason of Insanity*, 29 Rutgers L. Rev. 1011,1012 n.4 (1976); Kirschner, *Constitutional Standards for Release of the Civilly Committed and Not Guilty By Reason of Insanity: A Strict Scrutiny Analysis*, 20 Ariz. L. Rev. 233, 266 (1978); Note, *Commitment Following Acquittal By Reason of Insanity and the Equal Protection of the Laws*, 116 U. Pa. L. Rev. 924, 933 (1968).

[18]*See, e.g., Benham v. Edwards*, 501 F. Supp. 1050, 1054 n.1 (N.D. Ga. 1980); *Reynolds v. Neill*, 381 F. Supp. 1374, 1384 (N.D. Tex.) (three judge court), *vacated sub nom. Sheldon v. Reynolds*, 422 U.S. 1050 (1974), *reinstated*, 404 F. Supp. 1004 (N.D. Tex. 1975); *People v. Feagley*, 14 Cal. 3d 338, 356, 535 P.2d 373, 384, 121 Cal. Rptr. 509, 520 (1975). In petitioner's view, this is the analysis that should be applied if this Court determines that the classification at issue here satisfies the minimal rationality test.

Nevertheless, strict scrutiny analysis is unnecessary in the present case. For after an acquitee has remained confined for as long as the maximum term to which he could have been sentenced, the District of Columbia scheme lacks even a rational basis;[19] the classification here does not "rationally further[] some legitimate, articulated state purpose." *Maher v. Roe*, 432 U.S. 464, 470 (1977) (quoting *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17 (1973)).

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[19]Several state supreme courts, relying primarily upon the decisions of this Court in *Baxstrom v. Herold*, 383 U.S. 107 (1966), and *Jackson v. Indiana*, 406 U.S. 715 (1972), have invalidated disparate treatment of acquitees and commitees. Most of these courts have found that principles of equal protection require identical treatment of the two classes; a few have found that some disparity in treatment is constitutional. *See, e.g., State v. Clemons*, 110 Ariz. 79, 82-84, 515 P.2d 324, 327-29 (1973) (en banc) (equal protection clause prohibits disparate treatment of acquitees and commitees in either commitment or release proceedings); *In re Franklin*, 7 Cal. 3d 126, 140, 496 P.2d 465, 473, 101 Cal. Rptr. 553, 561 (1972) (en banc) (equal protection requires that acquitees be afforded same right to jury trial as other commitees); *Mills v. State*, 256 A2d 752, 757 (Del. 1969) (equal protection clause prohibits depriving acquitees of procedural protections afforded in civil release proceedings); *Wilson v. State*, 259 Ind. 375, 385-86, 287 N.E.2d 875, 881 (1972) (equal protection clause requires that acquitee be afforded same procedural protections as civil commitee in both commitment and release proceedings); *People v. McQuillan*, 392 Mich. 511, 540, 543, 221 N.W.2d 569, 582, 584 (1974) (equal protection clause requires that acquitees be afforded same procedural protections available in civil release proceedings); *State v. Krol*, 68 N.J. 236,253-55, 344 A.2d 289, 298-99 (1975) (equal protection clause requires that acquitees be afforded same procedural protections as civil commitees); *People v. Lally*, 19 N.Y.2d 27, 35, 224 N.E.2d 87, 92, 277 N.Y.S.2d 654, 660 (1966) (*Baxstom* requires that acquitee be afforded all procedural protections available in civil commitment proceedings); *State ex rel. Walker v. Jenkins*, 157 W. Va. 683, 690, 203 S.E.2d 353, 358 (1974) (equal protection clause requires that acquitee be afforded all procedural rights available to civil commitees); *State ex rel. Kovach v. Schubert*, 64 Wis. 2d 612, 622, 219 N.W.2d 341, 364 (1974) (equal protection clause requires that acquitee be afforded equivalent of civil commitment hearing), *appeal dismissed*, 419 U.S. 1117, *cert. denied*, 419 U.S. 1130 (1975).

(1) *The Trial Court's Finding That Petitioner Committed A Criminal Act Because of Mental Illness Does Not Provide A Rational Basis To Support The Continuing Disparate Treatment.*

For both the civil commitee and the insanity acquitee, the substantive standard for commitment is the same: present mental illness and dangerousness. As described above, however, the procedures for making this determination differ in significant ways. The court of appeals reasoned that petitioner's insanity acquittal, standing alone, is sufficient to relieve the government from the burden it must carry in civil commitment proceedings—to demonstrate *present* mental illness and dangerousness to a *jury* by *clear and convincing* evidence.[20]

[20]In fact, if the insanity acquitee is subject to an indeterminate commitment without the protections that petitioner now seeks, the acquitee is at the moment of his acquittal already disadvantaged in comparison with the hospital patient who has been committed only after the full course of civil commitment proceedings. For the acquitee is immediately confined for an indefinite period of hospitalization that will last unless and until he can affirmatively demonstrate his entitlement to release to a judge in proceedings under section 301(d), (e), or (k). The civil commitee may secure his release more easily, for the hospital itself may order the commitee's confinement to end. 21 D.C. Code §548. The 301(d) hearing—which differs from hearings under section 301(e) or (k) only in that it is automatically held within 50 days of the acquittal—is thus an even less effective safeguard than the *release* proceedings afforded civil commitees. One relevant comparison for equal protection purposes is, therefore, between petitioner's criminal trial, on the one hand, and the hearing afforded respondents in civil commitment proceedings, on the other. Although petitioner has followed the court of appeals in framing his equal protection analysis in terms of a comparison between insanity acquitees, who are subject to proceedings under section 23-301(d), and

(continued)

But the trial verdict alone cannot substitute for the finding of present mental illness and dangerousness that must be made before an indeterminate civil commitment. *See Baxstrom v. Herold*, 383 U.S. 107, 114-15 (1966).[21] As petitioner has argued, the factual predicate for his commitment has *never* been directly and affirmatively proved. In this case, proof that petitioner committed a criminal offense—trying to steal a coat—while mentally ill, simply cannot substitute for the affirmative proof of present mental illness and dangerousness required in civil commitment proceedings. *See supra* pp. 13-17.[22]

(footnote continued from preceding page)

potential civil commitees, who are treated under section 21-545, an alternative analysis based upon this other comparison will lead to the same result—that petitioner could not constitutionally be confined for longer than one year without hearings substantially equivalent to those held pursuant to section 21-545.

[21]In that case, the state contended that persons in Baxstrom's class could rationally be distinguished from civil commitees because they were "not only insane but [had] proven criminal tendencies as shown by their past criminal records." This Court responded:

> We find this contention untenable. Where the State has provided for a judicial proceeding to determine the dangerous propensities of all others civilly committed to an institution of the Department of Corrections, it may not deny this right to a person in Baxstrom's position solely on the ground that he was nearing the expiration of a prison term.

383 U.S. at 115 (footnote omitted). Likewise, here, the fact that petitioner has been found guilty of a crime is not a rational basis for depriving him of the statutory procedures for determining the dangerousness of putative civil commitees.

[22]This case, then, demonstrates the irrationality of a statutory scheme that treats all acquittals by reason of insanity—whatever the offense—as proving existing mental illness and dangerousness. For it is simply irrational to consider attempted petit larceny as equivalent to rape or murder in demonstrating dangerousness.

(2) *The Government's Interest In Preventing Dangerous Persons From Escaping Both Conviction And Commitment Does Not Provide A Rational Basis For The Disparate Treatment Of Acquitees And Commitees Once The Acquitee Has Been Confined As Long As He Could Have Been Upon Conviction.*

When Congress established the legislative scheme at issue here it sought to minimize the possibility that dangerous criminals would escape both imprisonment and commitment; it feared that within the class of insanity acquitees were some persons who had escaped imprisonment through erroneous acquittals. *See supra* pp. 9-11.[23] If there was a legitimate purpose to be served by distinguishing petitioner from civil commitees at the *outset* of his commitment, it may have been this desire to minimize erroneous avoidance of confinement.[24] But this purpose for differentiating petitioner from commitees on account of his insanity acquittal was fully attained once he

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[23]Congress hoped to reduce the number of persons who had undeservedly avoided confinement both by discouraging false insanity pleas and by confining those who nonetheless prevailed on such a plea. *See Lynch v. Overholser*, 396 U.S. 705, 715 (1962).

[24]Some commentators strongly dispute the rationality of using this policy to justify additional burdens for acquitees. They suggest that this method of discouraging false insanity pleas will actually discourage "legitimate pleas of insanity by those who do not wish to trade a determinate jail sentence for the uncertainties of hospitalization." German & Singer, *supra* note 17, at 1021; *see* Note, *supra* note 17, at 937. Moreover, these commentators argue that this approach may actually function to encourage false insanity pleas:

> Frequently, the insanity defense is the result of a plea bargain. Where prosecutors and judges know that a defendant will be incarcerated even if not convicted, they are more likely to tolerate, or even encourage, an insanity acquittal, thereby saving themselves both the time involved in a full trial, and the risk of that defendant's release if he is not convicted.

German & Singer, *supra*, at 1021.

had been confined for as long as he could have been if convicted and sentenced. Since the legislature in 22 D.C. Code § § 103, 2202 determined that confinement for at most one year was sufficient to protect the public against the harm of the offense of attempted petit larceny, the risk of erroneous avoidance of confinement was eliminated once petitioner had been confined for that year. Further confinement without the procedural protections afforded commitees achieved no legitimate purpose different from that supporting the confinement of commitees, and became merely an arbitrary penalty upon his right to plead not guilty by reason of insanity.

This Court's decisions in *Baxstrom v. Herold*, 383 U.S. 107 (1966), and *Humphrey v. Cady*, 405 U.S. 504 (1972), as well as in *Jackson v. Indiana*, 406 U.S. 715 (1972), all support this point. In differing contexts, these cases all suggest or expressly hold that a person's status as a criminal defendant, whether as a person who has been convicted of a crime and served his sentence (*Baxstrom*), as one who has been convicted and confined to a special term of therapeutic treatment in lieu of sentence (*Humphrey*), or as one who has been accused of a crime and found incompetent (*Jackson*), cannot excuse the failure to provide the ordinary protections extended in civil commitment proceedings before a person is committed to an indefinite term in a mental hospital. Each case in this line holds, on equal protection grounds, that upon the satisfaction of the purpose that initially justified the person's confinement, a continuation or renewal of the commitment can be accomplished only through the ordinary civil commitment process.[25] This point was reached in petitioner's case after he had served one year in the hospital.

[25] *See O'Conner v. Donaldson*, 422 U.S. 563 (1975), where this Court recognized that even when an involuntary confinement was "founded upon a constitutionally adequate basis . . . it [can] not constitutionally continue after that basis no longer exist[s]." *Id.* at 574-75; *see also McNeil v. Director, Patuxent Institution*, 407 U.S. 245 (1972).

The United States Court of Appeals for the District of Columbia Circuit, in *United States v. Brown*, 155 U.S. App. D.C. 402, 478 F.2d 606 (1973), analyzed these cases and arrived at substantially the conclusion that petitioner now urges. That court concluded that *Baxstrom* teaches that after a person has served his prison term, "whatever additional protection is [then] needed because of present danger from mental illness must be sought from ex-convicts on the same basis as from non-convicts who are dangerous by reason of mental illness." *Id.* at 408, 478 F.2d at 612. Applying this conclusion to the insanity acquitee, the *Brown* court said:

> The clear implications of the foregoing analysis, and *Baxstrom* require . . . that when the individual has been in detention for a considerable period of time, his continued detention *vel non* sould be governed by the same standard of proof as applies to civil commitments.[26]

Id.; *see United States v. Ecker*, 177 U.S. App. D.C. 31, 52, 543 F.2d 178, 199 (1976) (release proceedings must be the same after maximum sentence), *cert. denied*, 429 U.S. 1063 (1977); *Waite v. Jacobs*, 154 U.S. App. D.C. 281, 287, 475 F.2d 392, 398 (1973).[27]

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[26]The "considerable period of time" to which the *Brown* court referred could, the court explained, "never exceed the maximum sentence for the offense." 155 U.S. App. D.C. at 408, 478 F.2d at 612. The question whether Brown was entitled to a hearing by jury was not in issue, for he had had such a hearing. *Id.* at 403, 478 F.2d at 607.

[27]The government, in its opposition to the petition for certiorari, suggested that these court of appeals decisions are inapposite to the present case. The argument appears to rest on the fact that the defendants in *Brown* and *Waite* were tried both before the 1970 amendments to the District of Columbia insanity law and the court of appeals' decision in *Bolton v. Harris*, 130 U.S. App. D.C. 1, 395 F.2d 642 (1968). Thus, the argument goes, the position of these defendants can be distinguished

(continued)

Petitioner's case presents a particularly close analogy to *Jackson v. Indiana*, *supra*. In *Jackson*, an Indiana statute provided that a criminal defendant could be committed to a mental hospital before his trial if he was incompetent to participate in the proceedings. As long as he remained incompetent, he could, under the statute, remain hospitalized, even if there was no hope of future recovery. Justice Blackmun, wirting for a unanimous Court, reasoned that once it is determined that the defendant is unlikely to recover his competency in the foreseeable future, "then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant." 406 U.S. at 738. Once it had been determined that further care and treatment would not render him competent, the purpose of pretrial confinement had been fulfilled. Thus no rational basis remained for distinguishing this incompetent defendant from any other person facing possible commitment.[28]

(footnote continued from preceding page)

from that of petitioner because they never had the opportunity to have their sanity/dangerousness determined at a section 301(d) hearing. This distinction, however, is illusory. All that section 301(d) does is provide an automatic hearing—one at which the patient bears the burden of proving he is no longer mentally ill or dangerous—that is identical to the habeas corpus review to which Waite, for example, was entitled. Indeed, the very proceeding that culminated in the *Waite* decision was an appeal from the district court's denial of Waite's habeas petition. Thus, when the court of appeals decided *Waite*, he had in fact been afforded at least one hearing precisely like that which petitioner obtained under section 301(d). It is therefore clear that the alleged "distinction" is nonexistent.

[28]Recently, the First Circuit held that, under *Jackson*, the outer limit of detention for an incompetent defendant, even where it is uncertain whether his competency can be restored within the foreseeable future, is the maximum sentence possible under the crime with which he is charged. *United States v. DeBellis*, 649 F.2d 1, 3 (1st Cir. 1981).

The parallel to the present case is clear. Petitioner here need not challenge his initial commitment and detention under procedures substantially more burdensome than those afforded civil commitees. For even assuming the validity of that commitment, once his commitment on those terms persisted longer than the maximum prison sentence imposable after conviction, the rationality of the distinction disappeared.[29] Congress sought to avoid the risk that a dangerous person would escape an appropriate term of confinement. In petitioner's case, the statute that it enacted for this purpose has long since accomplished its goal. There is, therefore, no longer any reason to deny him the protections routinely provided in civil commitment proceedings. As every day passes, petitioner is denied equal protection of the laws.

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[29]This conclusion is supported by the Court's decision in *Humphrey v. Cady*, 405 U.S. 504 (1972). In *Humphrey*, the defendant was convicted of contributing to the delinquency of a minor, a misdemeanor carrying a one-year maximum sentence. Instead of imprisonment, however, he was committed to a "sex deviate facility"—an alternative confinement authorized by state statute for an initial term equal to the maximum prison sentence. The statute also permitted five-year renewals of commitment, imposable after a hearing that lacked many of the procedural protections available in civil commitment hearings. In a federal habeas petition, the defendant argued that such renewal commitments in the absence of the procedural protections available to civil commitees (including right to jury trial), violated the equal protection clause. This Court unanimously reversed the district court's dismissal of the habeas claim, and remanded for an evidentiary hearing. In so doing, the Court rejected the state's argument that the defendant's criminal conviction alone is sufficient ground for denying the procedural protections available in civil commitment proceedings. *Id.* at 510-11. The Court reasoned that the "renewal orders bear substantial resemblance to the post-sentence commitment that was at issue in *Baxstrom*," *id.* at 511, and therefore suggested that once the maximum sentence period has expired, the initial criminal conviction by itself cannot justify further commitment.

CONCLUSION

Petitioner's due process and equal protection arguments are separate roads that lead to a similar result. Because petitioner has already been confined in the hospital for a far longer term than he could have served had he never raised the insanity defense or had that defense failed, the remedy under either theory is clear. Because he has been denied due process of law, petitioner should either be released from his commitment, or be afforded a hearing that complies with the standards set forth in *Addington*. Moreover, because he has been denied equal protection of the laws, petitioner is similarly entitled to release, or to a hearing equivalent to that provided putative civil commitees in the District of Columbia.

Because petitioner has already been confined beyond the maximum prison sentence that could have been imposed, this case does not present the question of the kind of hearing that should be held immediately upon acquittal by reason of insanity, or upon the acquitee's return from a 50-day observation period at the hospital. Nonetheless, it appears to petitioner that more than one approach could be followed. If the government were not seeking a period of commitment that would last longer than the maximum sentence imposable upon conviction, or longer than such other appropriate measure of the sentence that the acquitee would have served but for the success of his insanity defense,[30] then present procedures would suffice. A hearing could be held at which the defendant would be required to demonstrate his eligibility for release. On the other hand, if the government at that point were seeking to initiate an indefinite commitment, it would be

[30] *See* n. 8 *supra*.

required to prove mental illness and resulting dangerousness to a jury by clear and convincing evidence. Alternatively, the government could postpone decision until shortly before the expiration of the maximum prison term, and then either seek indefinite commitment at a civil hearing, or permit the acquitee to be released.

For the foregoing reasons, the judgment of the District of Columbia Court of Appeals should be reversed.

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No. 81-5195

In the Supreme Court of the United States

OCTOBER TERM, 1982

MICHAEL JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the procedures by which petitioner, an insanity acquittee, was committed to a mental hospital in the District of Columbia deprived him of liberty without due process of law.

2. Whether petitioner's commitment violated principles of equal protection implicit in the Fifth Amendment Due Process Clause because the procedures employed differed in certain respects from those applicable to civil commitment of persons who have not been acquitted of a crime by reason of insanity.

3. Whether, assuming the procedures by which petitioner was committed were otherwise constitutionally adequate, he must nonetheless be released upon the expiration of the maximum sentence he could have received if he had been convicted on the criminal charge, unless he is recommitted in a new civil commitment proceeding.

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In the Supreme Court of the United States

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MICHAEL JONES, PETITIONER

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ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The original opinion of the panel (J.A. 8-22) and the opinion of the panel upon rehearing (J.A. 23-35) are reported at 396 A.2d 183 and 411 A.2d 624, respectively. The opinion of the en banc court of appeals (J.A. 36-67) is reported at 432 A.2d 364.

JURISDICTION

The judgment of the en banc court of appeals was entered on May 29, 1981. The petition for a writ of certiorari was filed on August 6, 1981, and was granted on January 11, 1982 (J.A. 68). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATUTES INVOLVED

Pertinent portions of the D.C. Code are reproduced in the appendix to this brief.

STATEMENT

A. The Statutory Scheme and its Development

1. *Commitment of Insanity Acquittees*

Prior to 1955, the District of Columbia statutes did not require commitment of persons acquitted of a criminal charge by reason of insanity. See D.C. Code Ann. § 24-301 (1951);[1] *Lynch* v *Overholser*, 369 U.S. 705, 715-716 & n.9 (1962). A significant change was made in 1955 in response to the decision in *Durham* v. *United States*, 214 F.2d 862 (D.C. Cir. 1954), which announced a departure from the M'Naughten Rule formulation of the insanity defense. Congress believed that the *Durham* rule would significantly expand the availability of the insanity defense and, absent remedial legislation, make possible the release into the community of dangerously insane individuals. See *Lynch* v. *Overholser*, *supra*, 369 U.S. at 715-717; *Ragsdale* v. *Overholser*, 281 F.2d 943, 947 (D.C. Cir. 1960). Accordingly, Section 301 was amended to provide (D.C. Code Ann. § 24-301(d) (1961)):

> If any person tried upon an indictment or information for an offense * * * is acquitted solely on the ground that he was insane at the

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[1] The statute provided for a special form of insanity acquittal verdict and prescribed that, in the event of an insanity acquittal,

> the court *may* certify the fact to the Federal Security Administrator, who *may* order such person to be confined in the hospital for the insane. [Emphasis added.]

time of its commission, the court shall order such person to be confined in a hospital for the mentally ill.[2]

In the District of Columbia at that time, and until 1970, the prosecution bore the burden of establishing the defendant's sanity at the time of the crime beyond a reasonable doubt—the standard generally applicable to federal prosecutions. *Davis* v *United States*, 160 U.S. 469 (1895); see *Leland* v. *Oregon*, 343 U.S. 790, 797 (1952). Two judicial decisions concerning the application of Section 301 under the prevailing insanity defense caused Congress again to revise the statute in 1970, as part of the District of Columbia Court Reform and Criminal Procedure Act, Pub. L. No. 91-358, 84 Stat. 473 *et seq.* First, in *Lynch* v. *Overholser*, *supra*, this Court interpreted Section 301(d) to apply only to persons who affirmatively avail themselves of the insanity defense. That holding was codified in 1970, by limiting application of Section 301(d) to a person who "raises the defense of insanity." D.C. Code Ann. § 24-301(d) (1973).

More importantly, Congress responded to the decision of the District of Columbia Circuit in *Bolton* v. *Harris*, 395 F.2d 642 (1968), which had engrafted onto the statute a requirement that, following commitment for a reasonable period necessary to determine an insanity acquittee's present mental condition,

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[2] An acquittal premised solely on the ground that the defendant was insane at the time of the offense was to be described as such in the jury's verdict. D.C. Code Ann. § 24-301(c) (1961). Provision was also made for conditional or unconditional release upon an appropriate recommendation of the superintendent of the hospital to which the defendant was committed, subject to judicial review, and for habeas corpus review of continued commitment upon the committee's application. D.C. Code Ann. § 24-301(e), (g) (1961).

"persons found not guilty by reason of insanity * * * be given a judicial hearing with procedures substantially similar to those in civil commitment proceedings." 395 F.2d at 651. The *Bolton* court interpolated the hearing requirement into Section 301(d), branding the statutory procedure otherwise to be "constitutionally suspect" because an insanity acquittal "reflects only a reasonable doubt that the defendant was sane at the time of the offense." 395 F.2d at 648, 650. The court directed that in future cases insanity acquittees be provided "[w]here feasible [with] * * * notice, counsel, jury trial, etc." (395 F.2d at 651 n.50) and that at the commitment hearing the government bear the burden of establishing by a preponderance of the evidence that the insanity acquittee is at that time mentally ill and dangerous. *Id.* at 651-653.

Congress reacted to the *Bolton* decision with consternation (H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 74 (1970)):

> This ruling permits dangerous criminals, particularly psychopaths, to win acquittals of serious criminal charges on grounds of insanity by raising a mere reasonable doubt as to their sanity and then to escape hospital commitment because the government is unable to prove their insanity following acquittal by a preponderance of the evidence. The result is a revolving door which, as now Chief Justice Burger explained in rejecting such an outcome in *Overholser* v. *O'Beirne* [302 F.2d 852, 861 (1961)], allows defendants "to have it both ways"—to escape both conviction and commitment to a hospital.
>
> The Committee considers this result intolerable. It neither protects the public safety nor provides treatment for a defendant acquitted of a crime on grounds of insanity.

In order to eliminate the constitutional infirmity perceived by the District of Columbia Circuit, without sacrificing the objectives of the 1955 amendment to Section 301, Congress provided that no criminal defendant in the District of Columbia may be acquitted by reason of insanity unless he affirmatively pleads, and establishes by a preponderance of the evidence, his insanity. D.C. Code Ann. § 24-301(j) (1973).[3] Moreover, to insure that continued hospitalization would not rest entirely upon a determination of *past* insanity, Congress directed that, following an initial commitment for evaluation, a hearing be held within 50 days, at which the acquittee, represented by counsel, may establish his eligibility for release by proving that he is no longer dangerously mentally ill. D.C. Code Ann. § 24-301(d)(1), (2) (1973).[4] Congress did not adopt all of the procedures specified in *Bolton*,

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[3] The constitutionality of Section 301(j) has been upheld by both the District of Columbia Court of Appeals and the District of Columbia Circuit. *Bethea* v. *United States*, 365 A.2d 64 (D.C. App. 1976), cert. denied, 433 U.S. 911 (1977); *United States* v. *Greene*, 489 F.2d 1145 (D.C. Cir. 1973), cert. denied, 419 U.S. 977 (1974). Indeed, a higher burden of proof of insanity could be placed upon defendants, consistent with due process. *Leland* v. *Oregon*, *supra*; *Rivera* v. *Delaware*, 429 U.S. 877 (1976) (dismissal for want of a substantial federal question); see *Patterson* v. *New York*, 432 U.S. 197, 205 (1977).

[4] Actually, Section 301(d) does not explicitly prescribe the criteria for commitment (as distinguished from the governing procedure). However, pointing to the release criterion established by Section 301(e), the District of Columbia Court of Appeals in this case interpreted Section 301(d) to require a showing "identical" to that required for other civil commitments under D.C. Code Ann. § 21-545(b) (1973), which the court described as a "twofold proof requirement of mental illness and dangerousness" (J.A. 46-48 & n.16).

however. Rather than prescribing complete conformity with procedures for regular civil commitments, Congresss provided that in the 50-day hearing the burden of proof would rest upon the acquittee to show lack of mental illness or dangerousness, and it did not provide for jury determination of the issues at that hearing. See H.R. Rep. No. 1303, 91st Cong., 2d Sess. 233 (1970). These commitment procedures are the ones applied to petitioner and remain in effect today.[5]

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[5] The language of Section 301 suggests that the provision applies to D.C. Code offenses whether tried in the United States District Court for the District of Columbia or the D.C. Superior Court (see *United States* v. *Greene*, *supra*, 489 F.2d at 1153), and to United States Code offenses tried in the district court. See D.C. Code Ann. § 24-301(h) (1973). The question whether Section 301(d) may, consistently with equal protection principles, be applied to persons charged with United States Code offenses, in addition to those, such as petitioner, charged with violation of the D.C. Code, is presently pending before the en banc District of Columbia Circuit in *United States* v. *Cohen*, No. 81-1036 (rehearing en banc granted, May 4, 1982). A divided panel of that court had held that Congress intended Section 301(d) to apply to acquittals on federal charges but that it is unconstitutional as so applied. *United States* v. *Cohen*, No. 81-1036 (Mar. 5, 1982). That decision was vacated by the full court upon granting rehearing en banc. The panel had declined to intimate any view as to the questions presented in this case. Slip op. 2.

We are advised that because the District of Columbia Circuit has expressed doubt as to the constitutionality of applying Section 301(j), the affirmative insanity defense, in prosecutions for United States Code offenses, it is the practice of the judges of the United States District Court for the District of Columbia to place upon the prosecution the burden of proving a defendant's sanity beyond a reasonable doubt in such cases. See, *e.g.*, *United States* v. *Whitlock*, 663 F.2d 1094, 1104 & n.76 (1980). Indeed, in *United States* v. *John W. Hinckley, Jr.*, Crim. No. 81-306 (Jury Judgment of June 21,

A committed insanity acquittee may secure release pursuant to any one of three procedural routes.[6] First, under D.C. Code Ann. § 24-301(e) (1973), a person is entitled to unconditional release upon certification by the superintendent of the hospital that the individual has recovered his sanity and will not be dangerous to himself or others. If the prosecuting authority objects to release upon such a certification, however, the court must hold an evidentiary hearing to determine whether "such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others."[7] The statutory standard has been construed to require that there "be freedom from such abnormal mental condition as would make the individual dangerous to himself or the community, in the reasonably foreseeable future." *Overholser* v. *Leach*, 257 F.2d 667, 670 (D.C. Cir. 1958) (footnotes omitted), cert. denied, 359 U.S. 1013 (1959), overruled in other respects, *Bolton* v. *Harris*, *supra*, 395 F.2d at 653; see *United States* v. *Brawner*, 471 F.2d 969, 1009-1010 (D.C. Cir. 1972) (en banc).[8] Provi-

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1982), the jury was instructed that the burden of proving sanity beyond a reasonable doubt rested upon the prosecution as to both the D.C. Code offenses and the federal offenses there charged.

[6] Like other civil committees, a committed insanity acquittee enjoys a statutory right to treatment. See D.C. Code Ann. § 21-562 (1973); *Tribby* v. *Cameron*, 379 F.2d 104 (D.C. Cir. 1967); *Rouse* v. *Cameron*, 373 F.2d 451 (D.C. Cir. 1966).

[7] The court may elect to hold such a hearing *sua sponte* as well, upon receipt of a release certification.

[8] Thus, notwithstanding the language of Section 301(e), the statute has been interpreted to allow release upon a showing of either an absence of dangerousness or a remission of mental illness. The D.C. Court of Appeals made clear in the

sion is also made for conditional release upon certification by the superintendent, subject to judicial review as described above, that the patient's recovery has advanced to the point that the conditions prescribed suffice to assure that the patient "will not in the reasonable future be dangerous to himself or others" (*Hough* v. *United States*, 271 F.2d 458, 461 (D.C. Cir. 1959); see also *United States* v. *Ecker*, 543 F.2d 178, 184, 194-199 (D.C. Cir. 1976), cert. denied, 429 U.S. 1063 (1977)).

In addition, Section 301(k) provides a committed individual the right to initiate a judicial proceeding to determine his right to release. Finally, Section 301(g) also provides for release upon writ of habeas corpus. Under either of these procedures initiated by a committed acquittee, as in the 50-day hearing, the burden of proving eligibility for release, by a preponderance of the evidence, is placed upon the patient. D.C. Code Ann. § 24-301(k) (1973); *Bolton* v. *Harris*, *supra*, 395 F.2d at 653. The assignment of the burden of proof when the hospital has recommended release is less clearly established. See *United States* v. *Ecker*, *supra*, 543 F.2d at 191-194 (Wilkey, J.); *id.* at 200-201 (Lumbard, J., concurring); *id.* at 202-203 & nn.5 & 6 (Wright, J., dissenting).[9]

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decision below that it approves that interpretation of the release standard (see J.A. 47-48 & n.16), and that to avoid commitment after the 50-day hearing under Section 301 (d)(2) it suffices that the acquittee make either showing. See pages 8-9 note 9, *infra*.

[9] Decisions of the District of Columbia Circuit regarding the precise standard for release are in some disarray. In *Dixon* v. *Jacobs*, 427 F.2d 589, 595 (1970), the court stated, in what may be dictum, that a committed insanity acquittee, like any other civil committee, is to be released if no longer mentally ill, or even if still mentally ill, if he is no longer

2. Procedures for civil commitment of other persons

The procedures governing involuntary civil commitment in the District of Columbia of persons other than insanity acquittees are contained in D.C. Code Ann. § 21-541 *et seq.* (1973).[10] Civil commitment proceedings may be initiated by a relative, guardian, police officer, physician, or, most commonly, by the Superintendent of St. Elizabeths Hospital, which serves as the public mental hospital for the District of Columbia. A petition for commitment must be filed with the Commission on Mental Health and is served upon the subject of the petition. D.C. Code Ann. § 21-541 (1973). The Commission is required to hold a hearing, at which the respondent is entitled to be represented by counsel. D.C. Code Ann. §§ 21-542, 21-543

"likely to injure himself or other persons." However, Judge Leventhal, concurring, suggested that a somewhat lesser likelihood of future dangerousness would suffice to continue commitment of an insanity acquittee. 427 F.2d at 601-603. In *United States* v. *Ecker*, *supra*, 543 F.2d at 194-199, a different panel, again divided, suggested a somewhat different release standard to be applied to committed insanity acquittees, at least under Section 301(e). Insofar as these decisions suggest that the standard for commitment under Section 301(d) differs from that applied in civil commitments, they reflect an interpretation of D.C. Code Ann. § 24-301(d) (1973) that is superseded by the en banc District of Columbia Court of Appeals' conclusion (see page 5 note 4, *supra*) that the commitment standard is "identical" to the civil commitment standard. Similarly, because the court below borrowed the Section 301(d)(2) commitment standard from Section 301(e), the views expressed by the D.C. Circuit in *Ecker* and by Judge Leventhal in *Dixon* as to the release standard for committed insanity acquittees have been substantially undercut.

[10] Separate procedures for temporary emergency commitments are set forth at D.C. Code Ann. § 21-521 *et seq.* (1973).

(1973).[11] The Commission is directed to render findings and conclusions as to whether the respondent is "mentally ill, and because of the illness * * *, likely to injure himself or other persons if allowed to remain at liberty." D.C. Code Ann. § 21-544 (1973). Should the Commission so find, the report is filed with the Superior Court, which must then set the matter for a hearing. The respondent may by timely demand secure a jury trial to determine whether commitment is justified. *Ibid.*; D.C. Code Ann. § 21-545(a) (1973).[12] At the hearing the petitioner must prove by clear and convincing evidence that the respondent is both mentally ill and dangerous to himself or others. D.C. Code Ann. § 21-545(b) (1973); *In re Nelson*, 408 A.2d 1233 (D.C. App. 1979).[13]

Release from civil commitment may be secured by any of several procedures. First, the chief of service of the hospital with custody is required to examine all committees at intervals no greater than every six months and to release those who no longer meet the

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[11] Counsel will be appointed if necessary for indigents or others unable to secure counsel. *In re Barnard*, 455 F.2d 1370, 1375-1376 (D.C. Cir. 1971).

[12] Even if no jury trial is demanded, the court is obliged to review the Commission's report and determine the issues. D.C. Code Ann. § 21-545(a) (1973); see *In re Walls*, 442 F.2d 749 (D.C. Cir. 1971).

[13] Prior to this Court's decision in *Addington* v. *Texas*, 441 U.S. 418 (1979), the required quantum of proof was held to be proof beyond a reasonable doubt. See *In re Hodges*, 325 A.2d 605 (D.C. App. 1974); *In re Ballay*, 482 F.2d 648 (D.C. Cir. 1973). Previously, the standard fixed by the courts had been proof by a preponderance of the evidence. *Bolton* v. *Harris*, *supra*, 395 F.2d at 651-653. *In re Nelson*, *supra*, announced the present standard, formulated in light of *Addington*.

statutory standard for commitment. D.C. Code Ann. § 21-548 (1973). If release is not initiated by the hospital, a patient or his representative may, periodically, secure an examination by hospital physicians, and by an independent physician. D.C. Code Ann. § 21-546 (1973). The chief of the hospital service may determine that the committee is to be released upon the basis of their reports. *Ibid.* If he concludes otherwise, but one of the examining physicians dissents from his decision, the patient is authorized to petition the court for release pursuant to D.C. Code Ann. § 21-547 (1973). Finally, a patient may seek release upon a petition for a writ of habeas corpus, by demonstrating that the statutory standard for commitment is no longer satisfied. D.C. Code Ann. § 21-549 (1973). The burden of establishing the right to release, by a preponderance of the evidence, is assigned to the patient. *Bolton* v. *Harris*, *supra*, 395 F.2d at 653.

B. Proceedings in this case

1. Petitioner is a patient at St. Elizabeths Hospital in the District of Columbia, where he has been committed as a dangerously insane individual since March 1976, pursuant to D.C. Code Ann. § 24-301(d) (1973). His commitment resulted from a charge of attempted petit larcency brought against him in September of 1975. Following a pretrial commitment to St. Elizabeths for a court-ordered competency examination,[14] and waiver of his right to a jury trial, petitioner was acquitted by reason of insanity in a

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[14] See D.C. Code Ann. § 24-301(a) (1973). The examining psychologist reported that petitioner was competent to stand trial but had "signs and symptoms of a severe mental disorder, including auditory hallucinations," warranting hospitalization at St. Elizabeths for treatment (J.A. 38-39 n.3).

bench trial upon stipulated facts in the Superior Court of the District of Columbia. The stipulation showed both that he had committed the crime and that the crime resulted from his mental illness. Upon his acquittal, petitioner was initially committed pursuant to D.C. Code Ann. § 24-301(d)(1) (1973) (J.A 36-39). On May 25, 1976, following the statutory "50-day" evidentiary hearing, the court remanded the petitioner for continuing commitment to St. Elizabeths Hospital, finding that petitioner "is mentally ill and as a result of his mental illness, at this time, he constitutes a danger to himself or to others" (May 25, 1976 Tr. 13).[15] However, the court

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[15] In an April 23, 1976, letter to the court, the Superintendent of St. Elizabeths stated that petitioner was suffering from schizophrenia, paranoid type, and was receiving medication. He added that "Mr. Jones is in need of further hospitalization, and by virtue of his mental illness, he would be a danger to himself and to others if released into the community at this time" (J.A. 39 n.5). Although petitioner asserts (Br. 17 n.11) that this "letter in fact had no independent evidentiary significance at petitioner's hearing under Section 301(d)," in actuality it is not clear what weight, if any, the letter was given by the court.

In any event, as petitioner concedes (Br. 2-3, 17 n.11) the only witness at the "50-day" hearing was a clinical psychologist from St. Elizabeths Hospital, Dr. Gertrude Cooper, who was called by the government and testified without contradiction that petitioner was suffering from "schizophrenia, paranoid type"; that petitioner's "illness is still quite active"; and that "he is still a danger to himself and to others" (May 25, 1976 Tr. 9). Petitioner observes (Br. 3 n.1) that the transcript of the 50-day hearing is not in the record considered by the court of appeals. Petitioner has nonetheless cited portions of it liberally and lodged it with the Court.

The excerpts cited by petitioner do not fairly reflect the thrust of the testimony given. First, the transcript reveals that despite the burden of proof placed upon petitioner by

evidently calendared a further hearing for November 29, 1976 (J.A. 9, 39).[16]

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the statute, petitioner called no witnesses, and the government volunteered to proceed first with its expert witness, Dr. Cooper. She had examined petitioner upon his admission to St. Elizabeths and had observed his behavior over an extended period of time. Her testimony established that petitioner was receiving heavy doses of an antipsychotic drug, Thorazine, intended to control his auditory hallucinations and delusional thought processes (May 25, 1976 Tr. 8-10). As stated above, Dr. Cooper concluded that petitioner remained seriously mentally ill and dangerous to himself and others. Petitioner's cross-examination was limited. Dr. Cooper testified (*id.* at 10) that petitioner remained a danger to the community and that he "is still likely to do the same thing again; the attempted larceny." Counsel appeared to concede that petitioner remained mentally ill, dangerous, and in need of treatment. Focusing his examination instead upon the possibility of transfer of petitioner to a different facility within St. Elizabeths, counsel explained (*id.* at 11-12):

> I think the issue here is one of relief. It is not only—it is easy enough to sit here and make a determination as to whether or not Mr. Jones is or is not a danger and the other things, but also the moral issue. Are we going to keep the man with nine hundred milligrams of Thorazine in Saint Elizabeths Hospital? What are we going to do? We have a moral obligation here.
>
> * * * * *
>
> Our moral obligation is to try to make a constructive citizen out of this man; try to help him.

On the questions of mental illness and dangerousness, which the court ruled to be the only questions open for decision (*id.* at 11), counsel conceded that "the testimony of the doctor speaks for itself" (*id.* at 12).

[16] The Superior Court's action in scheduling the follow-up hearing may have been prompted by language in *Bolton* v. *Harris*, *supra*, 395 F.2d at 652, directing that persons committed under Section 301(d) be afforded the periodic examinations prescribed for other civil committees under D.C. Code

At the hearing held on November 29, 1976, petitioner asserted that he was entitled to immediate release from the hospital unless civilly committed, because the maximum prison sentence that he could have received had he been convicted of the crime charged (one year's imprisonment) had expired. Petitioner argued that he was denied equal protection of the laws by the failure at that juncture to afford him the procedures applied to persons, other than insanity acquittees, whom the government seeks to commit by civil process.[17] After a further hearing on February 22, 1977, the court denied the requested relief and, reaffirming its findings at the 50-day hearing that petitioner remained mentally ill and danger-

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Ann. § 21-548 (1973) (see pages 10-11, *supra*), and the right to a judicial hearing if any examining physician finds grounds for release, prescribed by D.C. Code Ann. § 21-547 (1973). However, there is no indication in the record that petitioner was found to be releasable upon any such examination, and petitioner's claim that he was entitled to release rested solely upon his legal contentions.

[17] For reasons that are not of record, no attorney appeared for the government on November 29, 1976. Petitioner's motion for release was oral, so the government had no prior notice of petitioner's contentions. The Superior Court entered an order at the hearing directing the government either to initiate civil commitment proceedings or to show cause why the subsisting commitment should not be vacated. The government initially undertook to commence a civil commitment proceeding, and the staff of St. Elizabeths recommended commitment. (We note that a letter dated November 29, 1976, submitted to the Court by the Superintendent of St. Elizabeths Hospital reported that Jones had twice attempted suicide during his hospitalization to that point.) The government ultimately decided to adhere to the statutory scheme by contesting the demand for release. It then persuaded the Superior Court to withdraw its earlier order and instead to direct that petitioner pursue his demand for release by written motion, affording the government an opportunity to respond (J.A. 9-10).

ous, directed petitioner's continued confinement at St. Elizabeths (J.A. 10, 39).[18]

2. Petitioner appealed from this order and renewed his contention that equal protection principles required his release upon the expiration of his hypothetical maximum sentence unless the government invoked the procedures for civil commitment. A panel of the court of appeals initially rejected this argument (J.A. 8-22). The panel granted rehearing, however, and ultimately reversed itself (J.A. 23-35). Rejecting "the view that an acquittee's mental illness and dangerousness at the time of the offense are consistently such powerful evidence of illness and dangerousness later (*i.e.*, at the time of the 'release hearing') that they raise a presumption of continuing insanity in every case," the panel concluded that the differences between criminal and civil commitment procedures cannot be justified on purely evidentiary grounds (J.A. 32-33; citation omitted). The panel

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[18] Petitioner subsequently moved for unconditional release under D.C. Code Ann. § 24-301(k) (1973), but the motion was denied. Three months later, pursuant to D.C. Code Ann. § 24-301(e) (1973), he was granted conditional release on terms, recommended by the St. Elizabeths' staff, that allowed him to make daytime and overnight visits into the community. He was also admitted into the civil division of the hospital at that time, although as a result of disruptive behavior he was later retransferred to the forensic division (J.A. 39 n.6).

Following the decision in his favor by the panel of the court of appeals upon rehearing, petitioner was unconditionally released from St. Elizabeths on March 26, 1980. We are advised, however, that on April 8, 1980, petitioner was recommitted temporarily on an emergency civil basis for conduct unrelated to the prior commitment. On April 22, 1980, the court of appeals granted rehearing en banc, vacating the mandate of the panel. Petitioner was retransferred to the forensic division of the hospital and remains there today.

accordingly reasoned that the purpose of commitment of an insanity acquittee under Section 301(d) is necessarily "partially punitive"; that commitment on these terms justifies the confinement of an acquittee for treatment only until his or her hypothetical maximum sentence has expired (if at all); and that no basis for continued commitment exists thereafter unless the procedure for civil commitment is invoked (J.A. 32-34). The panel accordingly directed release of petitioner unless *de novo* civil commitment proceedings were initiated, leading to a new commitment order (J.A. 34-35).

The en banc court of appeals vacated the panel decision, however, and upheld the trial court's order (J.A. 36-56). The court concluded, first, that "there is no basis for finding § 301(d) punitive in any respect," holding that its purposes are "exclusively remedial and protective" and that a "punitive rationale has no part in the commitment of persons acquitted by reason of insanity" (J.A. 40, 41). The court explained (J.A. 42-44; footnote omitted):

> [P]lain reason compels rejection of [petitioner's] reliance on his hypothetical maximum prison term as artificial and meaningless. Statutory maximum sentences have no relationship to the purposes of mental care and treatment. They are intended rather, to set the outer boundaries of lawful punishment for persons found criminally responsible for specified offenses. * * * Subsection 301(d) commitments are neither expressly nor impliedly related to statutory maximum sentences. To the contrary, § 301(d) contemplates an indeterminate period of confinement and treatment, depending on when the patient has recovered his sanity or no longer poses a danger to himself or others.
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> * * * * *

> [R]eference to either a hypothetical maximum prison sentence, or even to a judically limited commitment term would completely refute the statutory purpose of § 301(d) and would frustrate any attempt at treating and rehabilitating mental patients who happen to have been acquitted of crimes by reason of insanity.

The court then rejected petitioner's contention that his continuing commitment under Section 301(d) denied him equal protection of the laws because it was based on procedures different from those afforded persons who are civilly committed other than insanity acquittees. At the outset the court stressed that the criteria for civil commitment under the two statutory schemes are identical, each requiring proof both of mental illness and dangerousness (J.A. 47-48 & n. 16).[19] Moreover, each procedure provides "the essential due process rights associated with involuntary commitment," including judicial determination of the issues, notice, and assistance of counsel (J.A. 48). The court identified three differences between the statutory commitment schemes: (1) the unavailability of a jury trial at the 50-day hearing under Section 301(d)(2); (2) the shift of the burden of proof to the acquittee under Section 301(d)(2); and (3) the different quantum of proof required for commitment under Section 301(d)(2) (J.A. 49-50).[20] Each fea-

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[19] The court stated that commitment under Section 301(d) is a civil proceeding (J.A. 43 n.10).

[20] The en banc court noted (J.A. 50 n.19) that it had not considered any differences in post-commitment procedures because petitioner's argument did not address such differences.

ture of the criminal commitment process was held to be justified by the exceptional procedural posture of persons who have been acquitted of a criminal offense by reason of insanity (J.A. 49-56).

The court concluded that the unavailability to an acquittee in a 50-day release hearing of the jury trial afforded to potential civil committees is "justified by the fact that the acquittee has had a right to a jury determination of his sanity at the time of the offense" (J.A. 50). The court noted that "the acquittee's mental illness is initially established by affirmative proof," adding that "[d]angerousness is no less validly established by proof that the defendant committed the criminal act, a finding necessarily underlying any acquittal by reason of insanity" (*ibid.*; citations omitted). The court accordingly held that "[t]he fact that [petitioner's present] mental illness and dangerousness are not jury determined, but derived from a prior jury finding, is not significant since the continuation of these attributes is a rational and permissible evidentiary presumption" (J.A. 50-51; footnote omitted).

The court also upheld the assignment of the burden of proof to the acquittee in the 50-day hearing (J.A. 52-53):

> It is entirely rational for the District to require an acquittee to prove his entitlement to release where he was the one to advocate the fact of his past insanity. Automatic § 301(d) commitment does not follow an acquittal by reason of insanity when the question of insanity is raised by the court or the prosecutor, rather than the defendant. *United States* v. *Wright*, 167 U.S. App. D.C. 309, 511 F.2d 1311 (1975). As mentioned

> above, the presumption that a mental condition continues is a reasonable one and it is also reasonable to require the person who raised the presumption to refute it by affirmative proof. Furthermore, whatever difference in risk allocation there might be between the two statutes as a result of who bears the burden of proof is minimized by the fact that when the acquittee bears the burden, he need prove entitlement to release by only a preponderance of the evidence, the lowest standard of proof * * *.

Finally, the court rejected petitioner's contention that the difference between the level of proof required for commitment under the two procedures violates equal protection (J.A. 53; footnote omitted):

> An acquittee's past insanity is proven by a preponderance of the evidence. His present insanity is determined by his failure to rebut, by a preponderance of the evidence, the presumption of continuing insanity. In contrast, a committee's detention is based on clear and convincing evidence of mental illness and dangerousness. *In re Nelson, supra.* The difference between these two standards is justified by the fact that Congress determined that a defendant raising an insanity defense should not have to meet a higher burden on such a relatively difficult issue. However, when the District seeks to commit a person who is disputing the fact of insanity or dangerousness, it is reasonable that the risk of error be more heavily thrust upon the government. See *Addington* v. *Texas* [441 U.S. 418 (1979)].

SUMMARY OF ARGUMENT

I

A. Petitioner was committed based upon the Superior Court's finding, resting on uncontradicted evidence, that he remained mentally ill and dangerous to himself and others at the time of his 50-day hearing. The procedures afforded petitioner at that hearing included notice, a judicial hearing, the assistance of counsel, and an opportunity to be heard and present evidence on the material issues at a meaningful time. Even though the statutory scheme would not have passed constitutional muster for purposes of ordinary civil commitment, it satisfied due process requirements as applied to petitioner.

In *Addington* v. *Texas*, 441 U.S. 418 (1979), this Court held that clear and convincing evidence is the standard of proof to be applied in ordinary civil commitment proceedings. But the Court's decision rested upon careful balancing of the constellation of relevant interests there at stake, rather than upon any fixed rule embodied in the Constitution regulating all involuntary hospitalization of the mentally ill. Unlike other persons subject to civil commitment, under the law applied in the District of Columbia an insanity acquittee [21] has been found beyond a reasonable doubt

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[21] We use the term "insanity acquittee" in this brief as a convenient shorthand way of referring to persons in petitioner's situation. We stress that the special verdict established by Section 301 is "not guilty solely by reason of insanity." See D.C. Code Ann. § 24-301(c) and (d)(1) (1973). Thus, as is reflected in the jury instructions employed in the District of Columbia, see *United States* v. *Brawner*, *supra*, 471 F.2d at 1008-1009, a judgment of not guilty by reason of insanity incorporates a determination of guilt respecting all elements of the offense, including the element of *mens rea*. See

to have committed a criminal act, but has been excused from the criminal sanction because he has successfully established, by a preponderance of the evidence, that the criminal act was the product of legal insanity. These special circumstances, which set an insanity acquittee apart from others to whom civil commitment procedures may be applied, justify the application of a different standard and burden of proof in the commitment of insanity acquittees.

First, the prior findings of insanity and criminal conduct substantially reduce the possibility, which concerned the Court in *Addington* (441 U.S. at 426), that commitment might rest upon conduct that is merely harmlessly idiosyncratic. The inherent uncertainty of predictions about human behavior, which infects all civil commitments, is substantially tempered in the case of the insanity acquittee because the acquittee has acknowledged, and the court or jury has found, that his own mental disease was the cause of criminal conduct. And the available empirical research shows that past unlawful conduct is the single most powerful variable in predicting future conduct of the same kind.

Moreover, the interests of the class of potential insanity acquittees would not be served by a rule that elevates the burden of establishing mental disease or dangerousness for purposes of commitment, because Congress deliberately tied that standard to the burden imposed upon defendants seeking acquittal on insanity grounds. Congress thereby guarded against the anomalous situation wherein an individual avoids

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Rucker v. *United States*, 280 F.2d 623, 625 (D.C. Cir. 1960). Our use of the term "insanity acquittee" should not obscure the fact that such a person has not been acquitted in the conventional sense at all.

both conviction and commitment solely because of discrepancies in the relevant standard or burden of proof. As a result of the linkage effected, however, the liberty interests of defendants in avoiding unwarranted conviction and avoiding unwarranted commitment are in tension. A proper accommodation of the two is reflected in the special commitment procedures applied to insanity acquittees.

We note as well that insanity acquittees lack the stigma-avoidance interests of other persons facing civil commitment, a factor the Court considered significant in *Addington* (441 U.S. at 425-426). At the time of the commitment hearing it is too late for one who has raised the insanity defense to avoid whatever stigma may be associated with antisocial conduct and mental illness.

The foregoing considerations have prompted the legislatures of the states generally to establish procedures for civil commitment of insanity acquittees that differ from those applied to other persons. Congress has done the same for the District of Columbia. Thus, unlike the judge-made Texas procedure condemned in *Addington*, which was virtually unique, the salient features of the commitment procedures for insanity acquittees in the District of Columbia bear the clear imprimatur of social and legislative consensus. This widely shared appreciation of the unique situation of insanity acquittees facing commitment should be given substantial weight by the Court in determining the requirements of due process.

B. Contrary to the contentions of petitioner and the amici, petitioner's commitment does not rest upon an impermissible presumption of continuing insanity and dangerousness flowing from his criminal trial, but upon affirmative findings of fact, rendered at the

commitment hearing, that those conditions remain present. To the extent petitioner's "presumption" argument focuses upon the propriety of selecting a different standard of proof from that ordinarily employed in civil commitment proceedings (*i.e.*, preponderance rather than clear and convincing), it does not further the constitutional analysis, but is instead analytically trivial. Inherent in the selection of any standard of proof is a "presumption" that proof falling short of that standard is insufficient to establish the ultimate fact at issue, while proof exceeding it may conversely be said to be "presumed" to establish the fact. But if the particular standard of proof is a fair and sufficiently reliable one for the purpose at hand to satisfy due process requirements generally, characterizing it as embodying a presumption detracts not at all from its validity.

Insofar as petitioner's "presumption" argument attacks that part of the statutory scheme placing the burden of production and persuasion upon him at the 50-day hearing, the issue is not presented in this case. The uncontradicted testimony of the government's witness was the only evidence presented at petitioner's 50-day hearing, and the court entered affirmative findings, based upon the record at the hearing, that petitioner remained mentally ill to such an extent as to be dangerous to himself and others if released.

In any event, there is no infirmity in the assignment of the burden of proof to an insanity acquittee generally. Contrary to petitioner, this Court's decisions respecting the role of presumptions as to elements of an offense in a criminal case are inapposite because the commitment proceeding is not criminal in nature. Moreover, as the advocate of his own insanity, it is

entirely appropriate that the acquittee bear the burden of providing reasonable assurance that the mental disease that excused his criminal conduct no longer poses an intolerable threat to society. If this is to be considered a presumption of continuing mental illness, it is fully supported by common experience; the reliability of this "presumption" is not called in question by evidence in the record or by the various psychiatric studies and hypotheses relied upon by petitioner and the amici curiae.

II

A. Petitioner and the amici suggest that the differences between the commitment procedures afforded to insanity acquittees and those prescribed for other civil commitments in the District of Columbia should be subjected to "strict scrutiny" equal protection analysis because a liberty interest is implicated. This Court, however, has applied the "rational relationship" analysis in its decisions respecting commitment resting upon mental disability or disease (see *Baxstrom* v. *Herold*, 383 U.S. 107, 111 (1966); *Jackson* v. *Indiana*, 406 U.S. 715, 729 (1972)), as well as in addressing other classifications that give rise to confinement (see, *e.g.*, *Marshall* v. *United States*, 414 U.S. 417 (1974)).

Strict scrutiny analysis is in any event inappropriate here because, as a consequence of the prior finding of a criminal act produced by mental illness, an insanity acquittee does not possess an unqualified liberty interest. In addition, the conflicting interest of the class of potential insanity acquittees respecting the standard of proof to be used at the criminal trial militates against strict scrutiny. There is simply no basis for holding that defendants possess a funda-

mental interest in being able to avoid conviction by demonstrating insanity by a preponderance of the evidence while simultaneously avoiding commitment although continuing dangerous mental illness is established with a comparable degree of reliability. In any event, there can be no occasion for strict scrutiny of the differing standards of proof applied in the District of Columbia to insanity acquittees and to others who are civilly committed, for Congress has made no such classification. Rather the higher standard of proof applied in ordinary civil commitments is entirely a product of judicial interpretation based upon the requirements of due process as finally determined in *Addington* v. *Texas* for that class of individuals. Accordingly, the special interests that support the procedure established in D.C. Code Section 301(d) as a matter of due process are equally sufficient to meet any challenge resting on elements of equal protection assured by the Fifth Amendment Due Process Clause.

B. The differences between commitment procedures applied to insanity acquittees and those applied in other civil commitment proceedings are directly and logically related to the circumstances that distinguish the two classes. The use of a preponderance of the evidence standard of proof is justified by Congress' decision to make the insanity defense reasonably accessible to mentally ill offenders, and the equally reasonable conclusion that the burden of proof in commitment proceedings should be commensurate with that in the criminal trial. The maintenance of parallelism in the two proceedings is essential to control what Congress considered to be a "revolving door" whereby an individual could avoid criminal responsibility yet be free of civil commitment, even

though the mental condition that produced his unlawful act remained unameliorated.

The omission of a jury trial at the commitment hearing is an appropriate reflection of the acquittee's special situation, for, unlike other committees, he has already had an opportunity for jury determination of his mental status. He also has had an opportunity—not available to civil committees—for a jury determination as to whether he committed the acts that ground the criminal charge. As a protection against the possibility of unwarranted commitment, this finding compares favorably with the unavoidably speculative findings based on predictions of future conduct made in ordinary civil commitment proceedings.

III

For the foregoing reasons, petitioner's commitment rests upon procedures that are no less reliable or constitutionally sufficient than those used to determine the need for civil commitment of persons who are not insanity acquittees. The expiration of the maximum hypothetical sentence petitioner could have received if convicted is accordingly irrelevant to the lawfulness of his continued commitment, which is maintained on the basis of essentially the same criteria as are applied to all other civil committees. Contrary to petitioner's argument, under the scheme devised by Congress his commitment is a true civil commitment, not a sentencing alternative resting upon a finding that he was guilty but mentally ill, which "sentence" might well be limited by the term applicable to others convicted and punished by imprisonment.

ARGUMENT

Petitioner is currently confined in St. Elizabeths Hospital pursuant to a civil commitment ordered under special procedures applicable in the District of Columbia to persons who have committed crimes for which they have been determined not to be responsible by reason of insanity. In order to obtain his release from this commitment, he must make essentially the same showing that is required of other civil committees to obtain their release. Petitioner asserts that he is thereby deprived of due process and equal protection, because his commitment has extended beyond the maximum period for which he could have been imprisoned had he been convicted. His claim of entitlement to treatment different from that of other civil committees is based on the differences between the procedures leading to his commitment and those employed for the commitment of persons who have not prevailed on an insanity defense at a criminal trial—most notably, the fact that his dangerous insanity was never determined under the clear and convincing evidence standard of *Addington* v. *Texas*, 441 U.S. 418 (1979).

Petitioner's contentions are unfounded. As we explain below, petitioner's commitment rests upon findings of present mental illness and dangerousness arrived at through procedures that fully comport with due process. And the proceedings in which these determinations were made were structured so as to yield findings that are no less reliable or constitutionally sufficient than those arrived at through the District of Columbia's regular involuntary civil commitment scheme. The differences between the ordinary civil commitment procedures and those applied to persons acquitted of criminal charges by reason

of insanity are fully justified by the special status of persons in petitioner's class. The maximum hypothetical sentence petitioner could have received if he had been convicted accordingly has no more bearing on the validity of his continued confinement than it would have had had he been committed under the ordinary civil commitment procedures.

While petitioner seeks to mitigate the potentially drastic consequences of his position by limiting his claim to the continuation of commitment beyond the hypothetical maximum sentence for the offense of which he was acquitted (Pet. Br. 9 n.3, 11, 19-20), there is in fact little in his arguments that would justify such a limitation. Rather, as the amici generally appear to recognize,[22] the arguments advanced implicate the adequacy at the threshold of the commitment procedures for any insanity acquittee—those whose disease has led them to commit rape or

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[22] See Georgia Legal Services Program ("GLSP") Br. 6-8; New Jersey Public Advocate ("NJPA") Br. 38-40; ACLU Br. 9-24.

Amicus GLSP suggests that petitioner's failure to appeal from the order of commitment entered after the 50-day hearing bars any challenge to the constitutionality of the commitment procedures used. Because the statute expressly authorizes proceedings to seek release from commitment at any time (subject only to a limitation upon frequency of consecutive challenges) (see D.C. Code Ann. § 24-301 (k) (2), (3) and (7) (1973)), and because petitioner could not know on the date of his 50-day hearing whether he would remain confined beyond the term of a hypothetical sentence, we hesitate to join in the suggestion that petitioner is barred from challenging the continuation of his confinement. We note, however, that because of petitioner's failure to present his contentions at the 50-day hearing, the Superior Court was denied an opportunity to make clear whether the findings grounding petitioner's commitment were supported by clear and convincing evidence (see page 43 & note 34, *infra*).

murder as well as those who lack the capacity to restrain themselves from committing petty thefts. As a consequence, our brief is in large part directed to the general due process (Part I) and equal protection (Part II) problems associated with commitment of any insanity acquittee, following which we separately focus upon the special considerations relating to insanity acquittees whose commitment extends beyond the maximum term of imprisonment that could have accompanied a conviction (Part III). Needless to say—and especially to the extent the Court's decision herein is based on principles of general applicability to all insanity acquittees—we believe the Court should proceed with great caution before imposing a constitutional straightjacket upon the States and the federal government in their efforts to protect society against the dangers that may be posed by persons who have committed criminal acts because of mental illness.

I. PETITIONER'S COMMITMENT WAS ACCOMPLISHED BY PROCEDURES THAT COMPORT WITH THE REQUIREMENTS OF DUE PROCESS

A. District of Columbia Procedures For Commitment Of Insanity Acquittees Strike A Proper Balance Among The Relevant Interests

1. Petitioner's reliance (Br. 8-13) on *Addington* v. *Texas* is misplaced.[23] Petitioner was committed under

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[23] Petitioner raises his *Addington* due process claim for the first time in this Court. In the Superior Court and in the court of appeals petitioner's argument was premised entirely on equal protection principles asserted to be implicit in the Due Process Clause. Petitioner relied on *Baxstrom* v.

a comprehensive integrated scheme fashioned by Congress (1) for the adjudication of claims of insanity raised as a defense to a pending criminal charge and (2) for determination whether persons who successfully raise such a defense are sufficiently

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Herold, 383 U.S. 107 (1966); *Jackson* v. *Indiana*, 406 U.S. 715 (1972); *Humphrey* v. *Cady*, 405 U.S. 504 (1972); and equal protection decisions of the D.C. Circuit. Both the panel of the court below (on each occasion) and the en banc court framed their opinions accordingly (see J.A. 11, 18, 21; J.A. 26, 33-34; J.A. 38, 40, 45-47, 54-56). This Court rendered its decision in *Addington* v. *Texas* subsequent to reargument of this case before the court of appeals panel, but prior to entry of the panel opinion on rehearing. No supplemental brief addressing *Addington* was submitted to the panel by petitioner (see J.A. 7). The panel was aware of this Court's decision in *Addington* (see J.A. 26 n.4) but plainly did not consider its applicability to be in issue. Nor did petitioner brief the *Addington* issue to the en banc court of appeals or otherwise suggest that the panel had overlooked a due process claim founded thereon (see J.A. 7). While we are informed that petitioner's counsel did mention *Addington* at oral argument before the en banc court of appeals, the en banc court plainly did not believe that an independent due process claim had been raised. The en banc court accordingly discussed the requirements of due process only in passing (see J.A. 47-49) and did not undertake to distinguish *Addington*. Under the circumstances, as we observed in our brief in opposition to the petition (page 12 note 13), it is arguable that petitioner's due process claim is not properly presented in this Court. See, *e.g.*, *United States* v. *Mitchell*, 445 U.S. 535, 546 n.7 (1980). Because the Court granted the petition without limiting the questions presented, and because the due process and equal protection issues are closely related (see pages 55, 57-58 and note 50, *infra*), we nonetheless address the due process claim.

mentally ill and dangerous to warrant commitment for their own protection and the welfare of society. The validity of Section 301(d) cannot properly be determined in isolation from this background.

Unlike Addington, whom the State of Texas sought to commit involuntarily without reliance upon the outcome of any prior judicial proceeding, petitioner had, prior to commitment, affirmatively pleaded mental illness as a defense to a criminal charge and had carried the burden of proving that mental illness constituting legal insanity was the cause of his criminal act.[24] Moreover, again unlike Addington, petitioner was found beyond a reasonable doubt to have committed a criminal act.[25] A jury determination of

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[24] Under the *Durham* rule in effect in the local District of Columbia courts at the time of petitioner's trial, coupled with D.C. Code Ann. § 24-301(j) (1973), an insanity acquittal embodied an affirmative finding that the criminal act was "a product of mental disease or mental defect." *Durham* v. *United States*, 214 F.2d 862, 874-875 (D.C. Cir. 1954). The District of Columbia Court of Appeals, following the lead of the District of Columbia Circuit, has since abandoned the *Durham* rule in favor of the American Law Institute test under which the accused must establish both that at the time of the offense he was suffering from a mental disease or defect and that as a result of that disease or defect he lacked substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. See *Bethea* v. *United States*, 365 A.2d 64 (D.C. App. 1976), cert. denied, 433 U.S. 911 (1977); *United States* v. *Brawner*, 471 F.2d 969 (D.C. Cir. 1972). The validity of commitment procedures applied to persons acquitted by reason of insanity in the District of Columbia would appear to be unaffected by this reformulation of the standard for determining insanity in the criminal trial.

[25] It appears that Addington's commitment also followed a misdemeanor arrest. See 441 U.S. at 420. But it does not

both the insanity issue and whether he committed the criminal act charged was available to petitioner. Examined in light of these characteristics, which distinguish petitioner and other insanity acquittees from persons subjected to regular civil commitment procedures, the procedures employed to commit persons in petitioner's situation comport fully with the requirements of due process.

First, petitioner does not challenge the criteria applied in determining that he should be committed.[26] Nor could any such challenge succeed, for while this Court has yet to determine precisely what predicate must be established to justify involuntary civil commitment, its decisions recognize that a showing that an individual is mentally ill and dangerous to himself and others suffices for this purpose. See *O'Connor* v. *Donaldson*, 422 U.S. 563, 573-576 (1975); *id.* at 580-585 (Burger, C.J., concurring); cf. *Addington*, *supra*, 441 U.S. at 421. Second, persons acquitted by reason of insanity are provided at the 50-day hearing with the essential procedures customarily afforded to assure fair and reliable decision-making: notice, a judicial hearing, the right to counsel (court-appointed, if necessary), an opportunity to be heard and present evidence at a meaningful time on all of the issues

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appear that Addington was ever tried upon that charge. Accordingly, at the time of his civil commitment he had not been found by any court to have committed the criminal act charged, much less to have committed the act as a product of mental illness. See page 64, *infra*.

[26] While the District of Columbia Court of Appeals did not clarify that standard fully until it rendered its decision in this case (see page 5 note 4, *supra*), the Superior Court correctly rested its commitment order upon findings that the petitioner remained mentally ill and dangerous to himself and others (May 25, 1976 Tr. 13).

relevant to the court's determination, a prompt on-the-record determination of the issues, and the right of appeal. See D.C. Code Ann. § 24-301(d)(3) (1973).

Petitioner claims, however, that his commitment was fatally defective under *Addington* because the government is not required by Section 301(d) to establish the basis for commitment by clear and convincing evidence. Petitioner misconceives the basis for the holding of *Addington*. To be sure, this Court there held that a traditional civil commitment must rest upon findings supported by clear and convincing evidence. 441 U.S. at 425-427. But that standard was not derived directly from the Constitution, nor was it found to be so deeply anchored in common law as to be a necessary element of due process, as is the "beyond a reasonable doubt" standard applied to elements of the offense in criminal cases. And the Court did not mechanically conclude that the deprivation of liberty entailed in commitment compels application of a heightened standard of proof in every case. Compare *In re Winship*, 397 U.S. 358, 361-364 (1970). Rather, in fixing the level of proof appropriate for ordinary civil commitment proceedings in *Addington*, the Court balanced the individual's interest in minimizing the possibility of an erroneous determination leading to an unwarranted commitment against the "state's interest in committing the emotionally disturbed under a particular standard of proof." 441 U.S. at 425; see also *Youngberg* v. *Romeo*, No. 80-1429 (June 18, 1982), slip op. 13 n.28.[27] Although the Court acknowledged uncertainty

[27] The Court has repeatedly employed this balancing analysis, derived from *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), in order to determine the requirements of procedural

(and a lack of evidence) as to whether triers of fact distinguish between a preponderance of the evidence rule and a clear and convincing evidence standard, the Court carefully weighed the competing interests because of the importance, symbolic if not practical, of the standard of proof as "instruct[ion to] the fact-finder 'concerning the degree of confidence' our society thinks he 'should have in the correctness of [the outcome-determinative] factual conclusions' " (441 U.S. at 423, quoting *In re Winship*, *supra*, 397 U.S. at 370 (Harlan, J., concurring)).

The Court recognized the state's substantial interest as *parens patriae* in providing care and protection to mentally ill persons within its jurisdiction, and its police power authority to protect the community from the dangerously ill. *Addington*, *supra*, 441 U.S. at 426. Yet the Court concluded that "[t]he individual should not be asked to share equally with society the risk of error" (*id.* at 427) because of the magnitude of the liberty interest at stake, the stigmatizing effect of commitment, and the perception that harmless idiosyncratic behavior might too readily form the basis for commitment unless a relatively strict standard of proof were required. *Id.* at 425-427. In addition, the Court noted (*id.* at 426) that only one state other than Texas had adopted a standard as lenient as preponderance of the evidence, implying that the nearly unanimous adoption of a stricter standard reflected a social consensus, relevant to the due process inquiry, as to the weight to be assigned to the com-

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due process in situations where the liberty interests of an individual will be affected by the determination made. In addition to *Addington*, see *Youngberg* v. *Romeo*, *supra*, slip op. 12-14; *Vitek* v. *Jones*, 445 U.S. 480, 494-496 (1980); and *Parham* v. *J.R.*, 442 U.S. 584, 598-613 (1979).

peting interests of the individual and society in the civil commitment context.

In adopting the clear and convincing evidence standard the Court rejected Addington's claim that a higher standard of proof, beyond a reasonable doubt or by "unequivocal" evidence, is required. 441 U.S. at 427-432. The considerations that underlay this conclusion are equally instructive here. The Court first noted that a civil commitment, though onerous, is not an exercise of state power in a punitive sense and does not carry with it the moral sanction of conviction. The Court also noted that the mentally ill as a class are not well served by an unduly strict standard of proof. The diminished liberty and stigma-avoidance interests of mentally ill persons do not require and, in fact, militate against adoption of a standard that would require the state to bear almost the entire risk of judicial error. Finally, the Court recognized that the inherent uncertainty that underlies the diagnoses and predictions of mental health professionals makes use of a reasonable doubt standard impractical, lest the substantial interests that are served by involuntary civil commitment be set at nought.

2. As the Court has recently reaffirmed, the requirements of procedural due process are flexible rather than fixed. See *Youngberg* v. *Romeo*, *supra*, slip op. 12-15; *Parham* v. *J.R.*, 442 U.S. 584, 599-613 (1979). Rather than mechanically applying the holding of *Addington* to the very different facts of petitioner's case, as petitioner and the amici curiae suggest, the Court should employ the balancing analysis that underlies *Addington*, with due attention to the factors that distinguish insanity acquittees from the other members of the population who are subject to civil commitment. As we explain below, the special posi-

tion of one who has sucessfully raised the insanity defense to a criminal charge necessarily affects the balance of interests to be struck.

a. The government's interest in committing an insanity acquittee for necessary treatment and for the protection of the acquittee and society is unmistakable. Such persons have been found, beyond a reasonable doubt, to have committed an act that Congress has determined (by enactment of a criminal statute) to be dangerous to society. See, *e.g.*, *Harris* v *Ballone*, No. 81-6863 (4th Cir. June 10, 1982), slip op. 7; *Warren* v. *Harvey*, 632 F.2d 925, 931 (2d Cir.), cert. denied, 449 U.S. 902 (1980); *In re Franklin*, 7 Cal. 3d 126, 137, 496 P.2d 465, 471, 101 Cal. Rptr. 553, 559 (1972); *Chase* v. *Kearns*, 278 A.2d 132, 134-135 (Me. 1971). This affirmative finding of the past commission of a dangerous act anchors the commitment decision in a way that has no counterpart in ordinary civil commitment proceedings, which often rest entirely upon unavoidably speculative professional assessments of future dangerousness. See *Addington* v. *Texas*, *supra*, 441 U.S. at 429-430; *O'Connor* v. *Donaldson*, *supra*, 422 U S. at 579 (Burger, C.J., concurring); *Greenwood* v. *United States*, 350 U.S. 366, 375 (1956). See pages 49-50, 53, *infra*.

In addition to the special indicia of dangerousness that are present in insanity aquittees but absent from other members of the population, insanity acquittees such as the petitioner have also been affirmatively found to have been mentally ill at the time of the criminal act. Because of these circumstances, the risk that an insanity acquittee will be erroneously found to be dangerously mentally ill based upon the evidence adduced at the Section 301(d)(2) hearing is substantially less than the risk of an erroneous de-

termination in the case of a person with no record of prior criminal acts and no prior finding of recent mental illness. Indeed, in the case of the insanity acquittee, there is a greatly diminshed hazard of improvident commitment resting solely upon "abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable" (*Addington* v. *Texas*, *supra*, 441 U.S. at 426-427). *Warren* v. *Harvey*, *supra*, 632 F.2d at 931.

b. Not only is the risk of erroneous commitment lessened in the case of insanity acquittees, but the interests of the acquittees themselves respecting the standard of proof are not identical to those of others who may face civil commitment. The relevant interests of an insanity acquittee include not only avoidance of commitment but also avoidance of conviction. But under the District of Columbia's statutory scheme, the standard of proof for establishing entitlement to an insanity acquittal is tied to the standard for subsequent commitment. Compare Section 301 (d)(2) with Section 301(j). The legislative history of the present provision makes it clear that Congress deemed it inequitable and improper for the situation to be otherwise. See H.R. Rep. No. 91-907, *supra*, at 74; see pages 4-5, *supra*. Accordingly, were a higher standard of proof to be required to commit an insanity acquittee, Congress apparently would have imposed a higher standard of proof upon defendants pleading insanity.[28]

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[28] That course would not be beyond its power. See page 5 note 3, *supra*. Nor is it in any sense inappropriate to link the two considerations, especially because the special commitment procedure embodied in Section 301(d) applies only to

Whether such a result would serve the interests of those who have occasion to raise an insanity defense is, to say the least, sufficiently open to question that this Court should hesitate before overruling the balance of interests effected by Congress in the statutory scheme. Cf. *Warren* v. *Harvey, supra*, 632 F.2d at 931.[29] The fact that petitioner was permitted to es-

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those who elect to raise the insanity defense and not to those who resist that plea. See page 3, *supra*.

As the Court noted in *Lynch* v. *Overholser, supra*, 369 U.S. at 715, in distinguishing persons in petitioner's situation from those who have not sought to avoid criminal responsibility by a plea of insanity:

> The criminal defendant who chooses to claim that he was mentally irresponsible when his offense was committed is in quite a different position. * * * Congress might have thought * * * that having successfully claimed insanity to avoid punishment, the accused should then bear the burden of proving that he is no longer subject to the same mental abnormality which produced his criminal acts.

[29] In *Benham* v. *Edwards*, 678 F.2d 511, 524-525 & n.24 (1982), the Fifth Circuit has criticized this analysis, suggesting that it approves punishment of the acquitted and asserting that the state has no legitimate interest in committing a person who is not mentally ill to a mental hospital, even if that individual was erroneously acquitted. The Fifth Circuit's criticism is wide of the mark. The issue is not whether society can punish those erroneously acquitted by reason of insanity, but whether a rule that makes civil commitment more difficult, but that also makes an insanity acquittal more difficult to obtain, serves the interests of putative insanity acquittees as a class. Consideration by the Court of interests of potential insanity acquittees that have no counterpart among those subject to ordinary civil commitment proceedings, in determining the relevant requirements of due process, does not render Section 301(d) punitive in either purpose or effect.

tablish his defense by a mere preponderance of the evidence is, as the court of appeals recognized (J.A. 53), for his benefit. Yet once the acquittee has been permitted to establish his mental illness and its connection with his demonstrated dangerousness by a preponderance of the evidence, without more, society has a compelling interest in assigning to the acquittee the burden of proving, with a similar degree of reliability, that these conditions no longer obtain. To impose upon the government the burden of proving by clear and convincing evidence that an insanity acquittee remains dangerously mentally ill would reopen the "revolving door" shut by Congress (see page 4, *supra*), through which persons who are more probably than not dangerously mentally ill escape both the criminal sanction and therapeutic commitment. Surely due process does not command any such result.[30]

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[30] Because operation of Section 301(d) is limited to persons who affirmatively elect, by raising an insanity defense, to invoke the scheme of coordinated burdens of proof, the present system is appropriately tailored to serve society's legitimate interest in discouraging false insanity pleas by persons viewing the plea simply as an avenue for avoiding incarceration. See *Lynch* v. *Overholser*, *supra*, 369 U.S. at 715; *Warren* v. *Harvey*, *supra*, 632 F.2d at 932. Plainly this factor has no counterpart in ordinary civil commitment proceedings.

In *Benham* v. *Edwards*, *supra*, 678 F.2d at 524, the Fifth Circuit discounted society's interest in discouraging false insanity pleas, suggesting that any such interest has punitive "overtones" and is accordingly not to be considered in determining the constitutionally appropriate standard of proof for civil commitment of an insanity acquittee. We disagree. The court of appeals' characterization (J.A. 40-45, 55) of Section 301(d) as nonpunitive is not undermined by recognition of a legislative purpose to deter false insanity pleas. The deterrence of false insanity pleas is an expression of

c. The interests of insanity acquittees in minimizing the risk of erroneous commitment are tempered in another respect as well. Insofar as the balance struck in *Addington* rests upon the stigmatizing effect of commitment (441 U.S. at 425-426), the different situation of insanity acquittees sustains a different rule. Whatever stigma attaches to a person civilly committed under normal circumstances, there is little incremental stigma attaching to civil commitment of an insanity acquittee, who by then has already been found to have been recently mentally ill and dangerous. See *Addington, supra*, 441 U.S. at 429; *Warren* v. *Harvey, supra*, 632 F.2d at 931-932.[31]

d. The unique calculus of interest relevant to commitment of insanity acquittees is reflected not only in Section 301(d), enacted by Congress to govern proceedings in the District of Columbia, but also in the statutes of numerous states. Although the patterns of state law are in considerable flux, in part because of substantial litigation in this area, it appears that a majority of the states retain statutes that require

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the high value placed upon the search for truth in our legal system, not a device to punish those who successfully raise an insanity defense. Cf. *United States* v. *Ceccolini*, 435 U.S. 268, 275-278 (1978). Accordingly, insofar as this deterrence rationale affects the rights of insanity acquittees, it must be regarded as a proper incident of an independent legitimate government purpose. See *Bell* v. *Wolfish*, 441 U.S. 520, 537-538 (1979); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963); *Flemming* v. *Nestor*, 363 U.S. 603, 613-617 (1960).

[31] *Vitek* v. *Jones, supra*, is not inconsistent with this argument, since the particular stigma associated with a finding of mental illness, which is present either in an insanity acquittal or in a civil commitment, is not present in a criminal conviction.

a lesser standard of proof for commitment of insanity acquittees than is required in civil commitments generally. See Note, *Commitment Following an Insanity Acquittal*, 94 Harv. L. Rev. 605, 605-606 & nn.4-6 (1981); see also Note, *Stopping the Revolving Door: Adopting A Rational System for the Insanity Defense*, 8 Hofstra L. Rev. 973, 999-1000 n.105 (1980).[32] And the state and federal courts that have considered the issue have generally agreed that the balance of interests relevant to the standard of proof for commitment of insanity acquittees differs materially from that pertaining to other civil committees.[33]

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[32] According to the cited Harvard Law Review survey (at 605 n.3), only 19 jurisdictions explicitly employ ordinary civil commitment standards for commitment of insanity acquittees. Even those jurisdictions generally retain some special procedures for insanity acquittees. Other jurisdictions have a variety of procedures, including automatic indeterminate commitment following an insanity acquittal, indeterminate commitment upon preliminary findings following a criminal trial but without an evidentiary hearing addressing the issues of present mental status and dangerousness, and automatic temporary commitment followed by a hearing at which a lesser burden is imposed upon the state than in other civil commitment proceedings—the procedure established by Section 301(d).

[33] Most of the decisional law on this subject antedates this Court's decision in *Addington* and like the decision below focuses upon considerations of equal protection. Among decisions rendered subsequent to *Addington* addressing the due process issue, *Harris* v. *Ballone*, *supra*, *Warren* v. *Harvey*, *supra*, and *People* v. *Chavez*, 629 P.2d 1040 (Colo. 1981), distinguish *Addington*. In *Benham* v. *Edwards*, *supra*, 678 F.2d at 521-528, however, the Fifth Circuit has rejected this distinction. See also *Williams* v. *Superintendent*, 43 Md. App. 588, 598-599, 406 A.2d 1302, 1308 (1979). Two intermediate level New Jersey courts have assumed without discussion that *Addington* is controlling in a related context, see

Thus, unlike the Texas provision at issue in *Addington*, which the Court recognized as something of a sport (441 U.S. at 426), Section 301(d) reflects a broad social consensus that the unique circumstances of an insanity acquittee justify confidence in the reliability of a commitment decision reached without requiring clear and convincing evidence of illness and future dangerousness. Section 301(d) is accordingly consistent with the requirements of due process. A

In re Newsome, 176 N.J. Super. 511, 424 A.2d 222 (App. Div. 1980); *In re Scelfo*, 170 N.J. Super. 394, 397, 406 A.2d 973, 975 (App. Div. 1979), but the legislature of that State has recently enacted legislation expressly reaffirming the preponderance of the evidence standard. See N.J. Stat. Ann. § 2C:4-8(b)(3) (1982 N.J. Sess. Law Serv.).

Decisions that treated the due process question prior to *Addington* generally recognized the special considerations that distinguish insanity acquittees from members of the public generally who might be subject to civil commitment. See, *e.g.*, *Alter* v. *Morris*, 85 Wash. 2d 414, 536 P.2d 630 (1975); *State* v. *Kee*, 510 S.W. 2d 477 (Mo. 1974); *Chase* v. *Kearns*, 278 A.2d 132 (Me. 1971); *Mills* v. *State*, 256 A.2d 752 (Del. 1969). Indeed, *State* v. *Kee*, *supra*, *Chase* v. *Kearns*, *supra*, and *Mills* v. *State*, *supra*, go so far as to uphold provisions effecting automatic indefinite commitment of insanity acquittees, subject only to availability of a release procedure. Other pre-*Addington* decisions disapprove on due process grounds state statutes that are significantly less protective than Section 301(d) in its present form, and that resemble the earlier version of Section 301(d) condemned in *Bolton* v. *Harris*, *supra*. See *State* v. *Krol*, 68 N.J. 236, 344 A.2d 289 (1975) (standards not related to purpose of commitment); *Powell* v. *Florida*, 579 F.2d 324 (5th Cir. 1978) (no opportunity to be heard as to present mental illness or dangerousness); *People* v. *McQuillan*, 392 Mich. 511, 221 N.W.2d 569 (1974) (same); *State ex rel. Kovach* v. *Schubert*, 64 Wis. 2d 612, 219 N.W. 2d 341 (1974) (same).

contrary decision would require the majority of the states to revise their procedures for commitment of insanity acquittees.

B. Petitioner's Commitment Under Section 301(d) Does Not Rest Upon An Impermissible Presumption Of Continuing Insanity And Dangerousness

1. Petitioner (Br. 17-19), joined by the several amici, contends that his commitment rests upon a constitutionally impermissible presumption of continuing insanity and dangerousness. In fact, however, petitioner's commitment rests upon no such presumption. Perhaps petitioner's argument could have been properly directed against Section 301(d) as it stood prior to the 1970 amendments thereto, for under the former scheme a defendant's acquittal on insanity grounds, resting conceivably on no more than a reasonable doubt as to a defendant's sanity, was by itself a sufficient basis for indeterminate commitment. In response to *Bolton* v. *Harris*, *supra*, however, the statute was amended to require a determination of the present mental illness and dangerousness of the acquittee as the predicate for commitment. Petitioner's commitment accordingly rests upon the findings of the Superior Court at the 50-day hearing and not directly upon any presumption of insanity or dangerousness. In petitioner's case, moreover, the government in fact shouldered the burden of producing evidence and successfully carried the burden of proof in that hearing.[34]

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[34] Given petitioner's failure to challenge, by cross-examination or presentation of conflicting testimony, the conclusions of the government's expert witness at the 50-day hearing and his counsel's apparent acquiescence in the findings of the government witness (see page 12 & note 15,

We have suggested, it is true, that the finding of insanity and commission of an unlawful act at the criminal trial has a legitimate bearing upon the standard of proof that may be utilized at an ensuing commitment hearing. But the legislature's consideration of the existence of such findings in fixing the appropriate legal standard for commitment of insanity acquittees cannot properly or usefully be regarded as the functional equivalent of a mandatory rebuttable presumption of continuing dangerous mental illness, as petitioner claims. What Congress has done in Section 301(d) is simply to set burdens of production and persuasion. Such an action involves a "presumption" only in the trivial sense that every allocation of trial burdens of proof "presumes" that proof falling short of the assigned standard is insufficient to establish the ultimate fact at issue and that proof surpassing the standard is sufficient to do so (*e.g.*, instead of saying that the plaintiff in a personal injury action must establish the defendant's negligence by a preponderance of the evidence, we could instead say that the defendant's infliction of injury upon the plaintiff is "presumed" not to have been negligent, or that it is "presumed" to have been negligent if that conclusion is indicated by a preponderance of the evidence).

In other words, if we are correct in our preceding argument that the procedures at the 50-day hearing are sufficiently fair and reliable to support commit-

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supra), it is doubtful that petitioner can complain of the committing court's failure to tie its findings explicitly to the standard of clear and convincing evidence. See page 28 note 22, *supra*. The *only* evidence presented was that petitioner remained mentally ill and dangerous to himself or others.

ment of an insanity acquittee, and that *Addington* does not require a different conclusion, then characterizing the hearing as entailing a presumption of continuing insanity simply has no bearing upon its constitutionality.[35]

We recognize, of course, that in addition to adopting a standard of proof lower than clear and convincing evidence, Section 301(d) on its face places the burden of persuasion, and apparently the burden of going forward as well, upon the insanity acquittee facing commitment.[36] The validity of these aspects of the scheme is not before the Court, however, for they were not actually employed in petitioner's case.[37]

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[35] Petitioner and the amici curiae rely upon *Sandstrom* v. *Montana*, 442 U.S. 510, 524 (1979); *Ulster County Court* v. *Allen*, 442 U.S. 140, 166-167 (1979); *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975); and *Leary* v. *United States*, 395 U.S. 6 (1969), for this aspect of their challenge to Section 301(d). In those cases the Court has addressed the strictures that due process imposes on various kinds of presumptions employed in criminal prosecutions to establish from other facts in evidence a fact not proven by direct evidence. But those cases have no application here. The Section 301(d) commitment procedure is not a criminal proceeding and therefore does not implicate the special concerns about shifting the burden of production or persuasion to the defendant that exist in criminal cases. Moreover, the 50-day hearing entails no reliance upon indirect proof as to the facts supporting commitment. Rather, these are to be established directly by relevant evidence adduced in the Section 301(d) hearing.

[36] The practical effect of assigning the burden of proof to one party or another is doubtful when the standard of proof is a mere preponderance of the evidence. It is only in the hypothetical case where the evidence is in absolute equipoise that such distinctions matter.

[37] Indeed, we understand that, despite the language of Section 301(d), it is the usual practice of the courts to take

The assignment of the burden of proof to the insanity acquittee is, in any event, not impermissible. That allocation rests upon a host of factors, including the special interests of potential insanity acquittees as a class in the accessibility of the insanity defense. Because defendants are permitted to escape criminal responsibility by advocating their own insanity and establishing the same by a mere preponderance of the evidence, it is entirely appropriate to place upon the insanity acquittee the burden of affording reasonable assurance that his release will not cause danger to himself or others because of the very mental disease that produced—and excused—his criminal act. If this is to be regarded as a presumption of continuing insanity, it is not impermissible. The record of this case contains no evidence to overcome the teaching of common experience that validates this "presumption." But in the final analysis this "presumption" rests not solely upon its verisimilitude, but upon the need to maintain the moral integrity of the criminal sanction and of the insanity defense. By purposely availing himself of the insanity defense, petitioner knowingly assumed and thus properly was subjected to the burden established by Section 301(d).

Finally, unlike the presumptions condemned in *Sandstrom* v. *Montana*, 442 U.S. 510, 524 (1979), and *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975) (see

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expert testimony addressing the issues of mental illness and dangerousness at 50-day commitment hearings from the staff of St. Elizabeths Hospital, whether or not evidence supporting release is offered by the acquittee. Accordingly, it does not appear that commitments are in practice ordered solely on the basis of an acquittee's failure to present evidence of remission of illness or nondangerousness. Moreover, we are advised that it is not uncommon for the commitment findings to take the affirmative form employed in petitioner's case.

page 45 note 35, *supra*), what the court of appeals imprecisely described (J.A. 51) as "a rational and permissible evidentiary presumption" is not really a presumption at all, for it rests not upon an arbitrary rule of law or even upon evidence or facts in the commitment proceeding, but upon the *findings* arrived at in the prior criminal trial respecting the very facts said to be "presumed" at the 50-day hearing. These findings, of course, do not foreclose litigation regarding the effect of the passage of time between the criminal action and the date of the commitment hearing on the defendant's mental illness or dangerousness. But due regard for considerations of judicial economy and judicial integrity justify the assignment of the burden of proving recovery to the insanity acquittee who has successfully established his past insanity. Compare *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 328-329 (1971), with *Sanders* v. *United States*, 373 U.S. 1, 15-19 (1963)[38]

2. Citing empirical surveys, the amici argue (ACLU Br. 14-16; GLSP Br. 26-29; NJPA Br. 28-32), however, that insanity acquittees are insufficiently likely to repeat harmful conduct to justify their removal from society by application of procedures different from those applied in ordinary civil

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[38] As a practical matter judicial economy and public protection considerations require that some weight be attached to a prior finding of insanity at many junctures in the commitment process. For instance prior findings support temporary commitment of insanity acquittees for evaluation (a practice uniformly approved by the courts), as well as limitations on the frequency of release applications, and assignment of the burden of proof on releasability to the committee, both of which are common features of civil commitment schemes.

commitments.[39] The studies cited are inapposite, however, because none of them addresses a population of insanity acquittees. Moreover, each of the studies covers the behavior of involuntary committees found to be releasable, a finding that could not be made in petitioner's case (see page 15 & note 18, *supra*); none of the studies sheds light upon the behavior of the distinct class of persons found unreleaseable.[40] So far as we are aware, no research find-

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[39] We note that none of the materials cited were called to the attention of the courts below. Particularly problematic is reliance upon the record in *Benham* v. *Edwards*, *supra*, compiled by amicus GLSP.

[40] For instance, Steadman & Keveles (*The Community Adjustment and Criminal Activity of the Baxstrom Patients: 1966-1970*, 129 Am. J. Psych. 304 (1972)) studied the recidivism rate among individuals released into the community from New York's correctional mental hospitals in response to this Court's decision in *Baxstrom* v. *Herold*, 383 U.S. 107 (1966). None of those individuals was an insanity acquittee; the class affected by *Baxstrom* consisted of convicted criminals who were subsequently administratively determined to be insane at the expiration of their prison term. 383 U.S. at 108-109. There is no reason to assume that this group is interchangeable with persons found to have committed a criminal act as a product of legal insanity. See page 31 note 24, *supra*. Similarly, T. Thornberry & J. Jacoby (*The Criminally Insane* (1979)) studied the arrest rate among individuals released to the community on the basis of a review procedure established pursuant to the decision in *Dixon* v. *Attorney General*, 325 F. Supp. 966 (M.D. Pa. 1971). Less than 2% of the sample studied consisted of insanity acquittees, and the majority of the group consisted of convicts subsequently administratively labeled insane. T. Thornberry & J. Jacoby, *supra*, at 65-66. The subject population also included some civil committees. *Ibid.* No effort was made to distinguish among these factually and legally distinct classes in the study conducted. In both of the aforementioned

ings are available that directly assesses the likelihood of future dangerous mental illness among insanity acquittees.[41] But what research is available suggests that past dangerousness, at least in the case of violent criminal conduct, is the most powerful available indicator of a high probability of future

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studies a substantial portion of the class affected by the relevant judicial decision remained in some form of civil commitment. The data collected concerning those who were released to the community is plainly not probative as to those deemed unsuitable for release.

[41] The amici appear to assume (see GLSP Br. 29 n.9; ACLU Br. 15 n.26) that the relevant comparison is between insanity acquittees and persons actually committed by ordinary civil process, or other classes of persons who present reason for heightened expectations of repeated anti-social conduct, such as paroled convicts. See also *Benham* v. *Edwards*, *supra*, 678 F.2d at 523-524 (rejecting view that "insanity acquittees are *more* dangerous" than civil committees (emphasis in original)). But in determining the standard of proof necessary to assure due process, the relevant comparison is between the classes of persons subject to commitment under each statutory scheme. In the case of Section 301(d), the class affected is limited to insanity acquittees. But ordinary civil commitment procedures could in theory be applied to any one of us. There are, to be sure, institutional safeguards of varying efficacy that protect against such abuse, but the constitutionally required standard of clear and convincing evidence was nonetheless designed with a view toward the virtually universal applicability of the civil commitment mechanism. See *Addington*, *supra*, 441 U.S. at 426-427. Because Section 301(d) is, by contrast, applicable only to the special class of insanity acquittees, the special procedures employed may be justified by reference to the characteristics that set insanity acquittees apart from the general population, any of whom is theoretically subject to civil commitment procedures, as well as from the class of persons actually subjected to civil commitment.

dangerous conduct. See, *e.g.*, J. Monahan, *The Clinical Prediction of Violent Behavior* 71-72, 80-82 (1981); Cocozza, Melick & Steadman, *Trends in Violent Crime Among Ex-Mental Patients*, 16 Criminology 317 (1978); Rabkin, *Criminal Behavior of Discharged Mental Patients: A Critical Appraisal of the Research*, 86 Psych. Bull. 1, 21 (1979).[42] These empirical findings confirm that the risk of an erroneous determination of dangerousness is substantially less for insanity acquittees than it is for those subject to ordinary civil commitment procedures.

The same is plainly true of the determination of mental illness. Petitioner and the amici argue that a variety of factors deprive the prior finding of insanity of any force that warrants consideration in determining the requisites of due process. Among these are (1) differences between the substantive elements of the insanity acquittal standard and the commitment standard, and (2) the lapse of time between the criminal act and the commitment, which allows for changes, both spontaneous and therapeutically induced, in the acquittee's mental state. These factors do not, however, undercut the rationale for the special commitment procedures applied to insanity acquittees.

To be sure, the tests for insanity as a defense to criminal charges and as a basis for civil commitment

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[42] In his view of the literature on this subject Professor Monahan highlights (at 80-81; emphasis omitted) a key finding of Cocozza, Steadman & Melick's research:

> [C]ompared with the general population, the higher rate of violent crime committed by released mental patients can be accounted for entirely by those patients with a record, particularly an extensive record, of criminal activity that predated their hospitalization.

are not identical. But it can hardly be questioned that under either the *Durham* rule applied in petitioner's case or the ALI definition of insanity (see page 31 note 24, *supra*), a finding of insanity is tantamount to mental illness for commitment purposes. On the other hand, contrary to the suggestion of GLSP (Br. 31-35), the finding of competency to stand trial at a time between the criminal act and the commitment is irrelevant, because the standard for determining competency at trial is entirely distinct from the standard for determining mental illness for commitment. See *In re Franklin*, *supra*, 7 Cal. 3d at 141 n.9, 496 P.2d at 474 n.9; 101 Cal. Rptr. at 562 n.9. This contention is especially frivolous where, as here, the competency report reflected that petitioner, although competent to stand trial, was severely mentally ill and required hospitalization. See page 11 note 14, *supra*. Nor does available scientific knowledge suggest, as the amici would have the Court believe, that an acquittee's insanity at the time of the criminal act has no bearing upon the likelihood that mental illness is present at the time of the commitment hearing. Indeed the very authorities cited by the amici confirm the contrary. See, *e.g.*, L. Kolb, *Modern Clinical Psychiatry* 342-343 (8th ed. 1973).[43]

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[43] Professor Kolb reports, for instance (at 343), that the class of patients diagnosed as suffering from schizophrenic psychoses have the following prognosis:

> Roughly, about one-third of those patients who are hospitalized during the first year of their illness make a fairly complete recovery; one-third improve and become able to return to outside life but remain damaged personalities and may have to return to the hospital from time to time. The remaining third will require indefinite

With all proper respect for the mental health professions, we think it remains true today that "[t]he only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment * * *." *Greenwood* v. *United States*, *supra*, 350 U.S. at 375. Accordingly, here as in *Greenwood* (*id.* at 376), "denial of constitutional power of commitment to Congress * * * ought not to rest on dogmatic adherence to one view or another on controversial psychiatric issues." See also *Powell* v. *Texas*, 392 U.S. 514, 535-537 (1968) (opinion of Marshall, J.). Indeed, "[w]ith all that we do not know about mental illness and social accountability for the acts of mentally ill persons, it is too soon * * * to move into place fixed constitutional concepts that may well prevent [Congress and the states] from working their way to * * * acceptable solution[s] to [these] complex problem[s]." *Benham* v. *Edwards*, *supra*, 678 F.2d at 543 (Roney, J., dissenting).

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hospital care. The introduction of the modern pharmaceutical therapies has not brought about a reduction in the number of schizophrenic patients requiring hospital care whose illness pursues a chronic course.

Consequently, the passage of some time between commission of a criminal act and a subsequent commitment hearing (see Pet. Br. 15; ACLU Br. 12; GLSP Br. 27) is not sufficient reason to disregard the earlier finding. We note that the possibility of substantial delay has been greatly restricted by the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*, and by this Court's decision in *Jackson* v. *Indiana*, *supra*. See also *United States* v. *DeBellis*, 649 F.2d 1 (1st Cir. 1981); *State ex rel. Deisinger* v. *Treffert*, 85 Wis. 2d 257, 270 N.W. 2d 402 (Sup. Ct. 1978).

C. Application of the Clear and Convincing Evidence Standard to Commitment of Insanity Acquittees is Mandated Neither By the Inherently Speculative Nature of Expert Testimony, Nor By the Nature of Petitioner's Offense

1. The amici suggest (ACLU Br. 16-17; NJPA Br. 33-35; GLSP Br. 29-31) that a clear and convincing evidence standard is necessary to correct for the inability of mental health professionals to predict future dangerousness accurately and for their apparent propensity to overpredict dangerousness. This argument is apt in *Addington's* traditional civil commitment context but misplaced here, for the reliability of the determinations that underlie commitment of an insanity acquittee is likely to be greater than that of determinations made in other contexts. Unlike the ordinary civil commitment, which may rest entirely upon professional predictions, an insanity acquittee has demonstrated his dangerous propensity by past criminal conduct. As discussed above (pages 49-50), the available research shows that past violent conduct is the best determinant of future violent conduct. Accordingly, the risk of erroneous commitment determinations respecting insanity acquittees seems likely to be lower than that the comparable risk as to other civil committees.

2. Petitioner (Br. 14-16) and amicus GLSP (Br. 15-17 & nn.5, 36-39) argue that reliance upon an acquittee's prior criminal act as an indication of dangerousness justifying commitment is misplaced in the present case because of the petty nature of petitioner's offense. Despite its superficial appeal, this contention is unsound. Petitioner "confuse[s] danger with violence." *Overholser* v. *O'Beirne*, 302 F.2d 852, 861 (D.C. Cir. 1961). Petitioner does not question, nor could he, Congress' power to punish petit lar-

ceny through the criminal sanction. Accordingly, while some might urge a different rule as a matter of policy, the Due Process Clause does not authorize the courts to second-guess Congress' judgment that Section 301(d) should apply irrespective of the criminal offense charged.[44] As the District of Columbia Circuit explained in *Overholser* v. *O'Beirne*, *supra*, 302 F.2d at 861:

> Larceny is usually less violent than murder or assault, but in terms of public policy the purpose of the statute is the same as to both. Larceny, assault and murder are all dangerous; they are simply different areas of prohibited conduct. Hence unless we are to ignore the objectives and policies of the statute in question, the release provisions must apply in the same way and with the same force to larceny without violence as to a crime of violence until Congress speaks otherwise.

An insanity acquittal embodies a finding that the defendant's behavioral controls were inoperative or gravely impaired. See page 31 note 24, *supra*. The probability of repetition of unlawful conduct is accordingly enhanced. Therefore, even if the maximum sentence prescribed is taken as an index of the dangerousness of a single repetition of a criminal act, a relatively short sentence does not negate the dangerousness of the insanity acquittee, as that concept relates to the commitment process.

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[44] This is especially clear because Section 301(d) does not apply unless the defendant purposely avails himself of the insanity defense.

II. SECTION 301(d) DOES NOT DENY EQUAL PROTECTION TO INSANITY ACQUITTEES

A. Strict Scrutiny Of Differences Between Commitment Procedures For Insanity Acquittees And Those For Other Civil Committees Is Not Required

The arguments of petitioner and the amici based upon the equal protection component of Fifth Amendment due process largely repeat the contentions made under the rubric of due process. And our response is largely the same as well: the special considerations that alter the balance of interests relating to the proper standard of proof also amply justify the differences between the procedures afforded to insanity acquittees and those afforded to other persons subject to civil commitment in the District of Columbia, for "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940).

The entirely rational relationship between the special attributes of insanity acquittees and the special procedures applied is explained below at pages 58-64. We pause, however, to consider petitioner's contention (Br. 22 & n.18; see also GLSP Br. 17-22) that the differences between the commitment procedures prescribed by D.C. Code Ann. § 24-301(d) (1973) for insanity acquittees and those prescribed for other persons by D.C. Code Ann. § 21-541 *et seq.* (1973) require application of strict scrutiny analysis because a liberty interest is involved. That contention has no merit.

As the Fifth Circuit recognized in *Benham* v. *Edwards*, *supra*, 678 F.2d at 515-516 n.9, this Court has never held that deprivation of liberty alone necessitates strict scrutiny for classifications pertaining to involuntary confinement. See *Marshall* v. *United States*, 414 U.S. 417, 422 (1974) (criteria for re-

habilitation of narcotics offenders in lieu of imprisonment); compare *id.* at 431-433 (Marshall, J., dissenting).[45] This Court's equal protection decisions in the area of commitment and detention for mental health reasons have consistently applied the rational relationship analysis. Starting in *Baxstrom* v. *Herold*, *supra*, the test applied was whether the "distinction made [has] some relevance to the purpose for which the classification is made." 383 U.S. at 111. In *Jackson* v. *Indiana*, *supra*, 406 U.S. at 729, the statutory classification was tested against a "reasonable justification" benchmark.[46] The lower courts have generally applied the rational relationship analysis as well.[47]

Strict scrutiny analysis (which, we submit, the statutory scheme would survive) is not indicated here, because an insanity acquittee does not possess an unqualified liberty interest.[48] In rejecting imposi-

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[45] Justice Marshall acknowledged (414 U.S. at 432) that "this case does not fit into any neat 'fundamental interest' or 'suspect classification' mold."

[46] To be sure, the classifications considered in *Baxstrom* and *Jackson* did not withstand scrutiny under the rational relationship test. But the Court's language, especially in *Baxstrom*, clearly reflects the applicable standard.

[47] See, *e.g.*, *Harris* v. *Ballone*, *supra*, slip op. 7-10; *Powell* v. *Florida*, *supra*, 579 F.2d at 331-332; *People* v. *Chavez*, *supra*, 629 P.2d at 1051-1052; *In re Franklin*, *supra*, 7 Cal. 3d at 135, 496 P.2d at 470, 101 Cal. Rptr. at 558; *Mills* v. *State*, *supra*, 256 A.2d at 756; *Chase* v. *Kearns*, *supra*, 278 A.2d at 138. See also *Benham* v. *Edwards*, *supra*, 678 F.2d at 515-516 n.9 (rejecting strict scrutiny). We note that the panel opinion in *United States* v. *Cohen*, *supra*, cited by GLSP (Br. 21), has been vacated. See page 6 note 5, *supra*.

[48] The distinctions at issue here are merely procedural. The Court has no occasion to consider whether commitment

tion of a requirement of proof beyond a reasonable doubt in *Addington*, the Court explained (441 U.S. at 429): "One who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma." See also *Mills* v. *Rogers*, No. 80-1417 (June 18, 1982), slip op. 11. This observation has special force where, as here (and unlike *Addington*), commitment follows a prior finding of insanity. Moreover, a strict scrutiny analysis is unwarranted, and indeed unworkable, because as we have explained above (pages 37-39), the liberty interests of potential insanity acquittees are conflicting: whatever standard of proof is applied in commitment proceedings may well be reflected in the standard employed for the insanity defense. In this respect, the interests of a defendant who has yet to be tried are opposite to those of the individual acquitted on insanity grounds. Yet, because the standards applied in the two situations can be appropriately linked, the interests of the potential insanity acquittee and the constitutionality of the statutory scheme must be considered with reference to the entire procedure.

The genesis of the disparity between the standards of proof applied to civil commitment generally and at the 50-day hearing for insanity acquittees further demonstrates the inapplicability of strict scrutiny analysis—indeed, the lack of any serious equal protection issue. The difference in standards is not the product of any legislative classification; the natural reading of D.C. Code Ann. § 21-545 (1973), the general civil commitment statute, is that commitment may be ordered on the basis of proof by a preponder-

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of insanity acquittees resting on application of substantive criteria different from those for other civil commitments would require heightened scrutiny.

ance of the evidence.[49] The injection of a stricter standard of proof for civil commitment is solely the product of judicial interpretation of constitutional due process requirements—most recently, the imposition of the clear and convincing evidence requirement of *Addington*. *In re Nelson*, *supra*, 408 A.2d at 1237 n.7; see page 10 & note 13, *supra*. But if we are correct in our argument in Part I that due process permits commitment of insanity acquittees on the basis of a preponderance standard (and if that is not correct, there is no need even to consider the equal protection issue), then the difference in standards is solely attributable to the judicial determination that the process due the two classes of committees is different. The differences that justify this conclusion for due process purposes almost by definition justify it for equal protection purposes.[50]

B. The Procedural Differences Between The Two Statutory Schemes Are Justified By The Circumstances That Distinguish Insanity Acquittees From Other Persons Subject To Civil Commitment

1. Petitioner's argument rests on three differences between the procedures prescribed by Section 301(d)

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[49] Indeed, the District of Columbia Circuit so interpreted that statute in *Bolton* v. *Harris*, *supra*, 395 F.2d at 651 n.50.

[50] We recognize that this analysis does not apply fully to those procedural differences created by Congress, including the differing jury trial rights afforded to insanity acquittees and other civil committees. But see *People* v. *Chavez*, *supra*, 629 P.2d at 1052 & n.22. Nonetheless, it cannot be a matter of indifference for purposes of equal protection analysis that the statutory scheme is determined to comport with due process based upon consideration of the special factors and circumstances applicable to the class involved. This is especially true where, as here, any right to equal protection arises only from the Due Process Clause of the Fifth Amendment. See *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

and those prescribed for other civil commitment proceedings: (1) the use of a preponderance-of-the-evidence standard of proof; (2) the assignment of the burden of proof to the acquittee; and (3) Congress' failure to provide for a right to a jury trial at the 50-day hearing.[51] As we have explained above in connection with the due process issue, the procedures employed to commit insanity acquittees in the District of Columbia are carefully adjusted to the special situation of insanity acquittees as a class. Discussion of the equal protection issue may accordingly be abbreviated.

The provisions of Section 301(d) respecting the standard and burden of proof do not deny petitioner equal protection.[52] The use of a preponderance of the evidence standard of proof is, as the court of appeals recognized (J.A. 53), intended for the benefit of the would-be insanity acquittee, who is governed by a commensurate standard of proof in establishing his

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[51] Petitioner, joined by amicus GLSP (Br. 12-22), also complains (Br. 21-22) of differences in the applicable release procedures. This claim was not presented in the court of appeals and was not addressed by the en banc court (J.A. 50 n.19; see page 17 note 20, *supra*). It accordingly should not be considered here. Consideration of alleged disparities in release procedures would be particularly inappropriate because the panel, in its initial opinion, directed certain adjustments in the release procedures (J.A. 21 & n.10), similar to those instated by the District of Columbia Circuit under the pre-1970 version of Section 301(d), in *Bolton* v. *Harris*, *supra*, 395 F.2d at 652. Plainly petitioner's contentions in this connection are more properly directed to the District of Columbia courts. We accordingly do not address any disparities in the release procedures.

[52] As explained above (page 45), the question whether the burden of proof may properly be assigned to the insanity acquittee is not presented in this case.

insanity defense. The legitimate legislative perception of a need to harmonize the standards for acquittal and commitment, a factor entirely absent in the civil commitment context, explains and justifies the difference in treatment of these differently situated individuals. The preponderance standard is also justified, as discussed above, by the lesser risk that an erroneous finding of dangerous insanity will be made in committing an insanity acquittee, because of the prior findings of legal insanity and, by proof beyond a reasonable doubt, of commission of an unlawful act. The diminished liberty and stigma avoidance interest of such persons also set them apart from citizens who have not avoided responsibility for an otherwise criminal act by establishing insanity. And the sovereign's interest in deterring false insanity pleas, which has no counterpart to be considered in other civil commitments, also supports the classification.[53] See also pages 57-58, *supra*.

The unavailability of a jury trial is likewise justified by the special circumstances of an insanity acquittee. Unlike other civil committees, an acquittee has already had the right to a jury determination of his insanity as of a time in the recent past. Perhaps more significantly, commitment of an insanity acquittee cannot proceed under Section 301(d) unless the criminal trial has established beyond a reasonable doubt that the individual has committed an unlawful antisocial act. This affords a substantial protection against commitment based solely upon the

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[53] The same considerations justify assignment of the burden of proof to the insanity acquittee, although, as we have explained (see page 45 n.37, *supra*), this formal allocation is not in practice regarded as placing the burden of producing evidence on the acquittee.

often unavoidably speculative predictions of mental health professionals as to future conduct—protection that is unavailable to other civil committees. Although the issues before the jury in the criminal trial and before the judge in the 50-day hearing are not identical, they are in general sufficiently similar that Congress' decision not to provide two jury trials for insanity acquittees cannot be said to exceed its "substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of [government] to remedy every ill." *Plyler* v. *Doe*, No. 80-1538 (June 15, 1982), slip op. 13.

2. Contrary to the contention of petitioner and the amici, the decision of the court of appeals does not conflict with any decision of this Court. Reliance upon *Baxstrom* v. *Herold*, *supra*, is misplaced. In *Baxstrom* the petitioner had been convicted of a criminal offense and sentenced to a term of imprisonment. During that term, he was "certified" to be insane by a prison physician and was transferred to serve the balance of his sentence at a hospital operated by the state prison authority. No hearing or adversary process of any kind was afforded him. See *Vitek* v. *Jones*, *supra*, 445 U.S. at 494-496. Shortly before his sentence expired, a hearing was held at which a judge determined that Baxstrom "may require mental care and treatment." See 383 U.S. at 109. On the basis of this finding, Baxstrom remained committed to the correctional hospital beyond the expiration date of his sentence. This Court held that Baxstrom had been denied equal protection by his civil commitment at the end of his sentence without the opporunity, afforded to all others civilly committed under state law, for a

jury determination of the need for commitment. 383 U.S. at 110-112. The Court held further that Baxstrom was denied equal protection by his commitment to a correctional institution (rather than a civil mental hospital) without a judicial determination (available to nonprisoners) that he was so dangerously mentally ill as to require confinement in such an institution. 383 U.S. at 110, 112-115.

Baxstrom, in the Court's view, was indistinguishable from a non-criminal facing civil commitment, since neither person has been provided any prior opportunity for a jury determination of mental illness. 383 U.S. at 111-112. The *Baxstrom* Court recognized, however, that "[e]qual protection does not require that all persons be dealt with identically," holding only that "it does require that a distinction made have some relevance to the purpose for which the classification is made." 383 U.S. at 111 (citation omitted). That test is satisfied here. The provisions of D.C. Code Ann. § 24-301(d) (1973) applied to petitioner are tellingly different from the procedures applied to Baxstrom. And petitioner's status is different in key respects from Baxstrom's. Unlike Baxstrom, whose conviction in no respect reflected any finding of mental illness or need for hospitalization, petitioner was found to have committed a criminal act that was the product of insanity at his criminal trial. And petitioner was afforded a judicial commitment hearing, with the right to court appointed counsel, at which his present insanity and dangerousness was established. Compare 383 U.S. at 109 n.1. To be sure, petitioner was not afforded a jury trial, such as is available to civil committees, at this second juncture. That procedural difference, however, is justifiable because of the earlier opportunity for a jury

determination respecting petitioner's sanity at the time of his crime. Thus, unlike Baxstrom, petitioner has been afforded the protection of reliable procedures for the purpose of determining the relevant fact—*i.e.*, whether or not he is dangerously mentally ill.

The court of appeals properly distinguished *Jackson* v. *Indiana*, *supra*. *Jackson* proscribes indefinite commitment of one charged with a criminal offense but found incompetent to stand trial. The Court found a denial of equal protection stemming from application of a criterion different from that applied to civil commitments. 406 U.S. at 723-730. Here, however, the criterion applied to petitioner is identical to that applied to civil committees—continued commitment rests on a finding of mental illness and dangerousness for both types of committees. See page 5 note 4, *supra*. *Jackson* also found a denial of due process in a commitment, premised solely upon the pendency of criminal charges, of an individual unable to attain competency for trial. 406 U.S. at 738. The Court did not question the state's power to commit such a person upon a showing of dangerous mental illness—noting only that Indiana had not detained Jackson on that basis. 406 U.S. at 737. Here, unlike *Jackson* (406 U.S. at 738), the "nature and duration of commitment bear[s] some reasonable relation to the purpose for which the individual is committed." [54]

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[54] *Specht* v. *Patterson*, 386 U.S. 605 (1967), is likewise inapposite. There the defendant was convicted of a sexual offense but, in lieu of an ordinary term, was "sentenced" to an indeterminate term of confinement under a separate procedure applicable to sex offenders. No opportunity was given for a hearing at which defendant might present evidence or confront adverse witnesses with respect to the need for such confinement. The Court found a denial of due process

3. The various amici suggest that the classification effected by Section 301(d) is irrational because underinclusive: excluding convicted criminals who become mentally ill during their sentences, persons suspected of minor criminal acts who are diverted to ordinary civil commitment proceedings in lieu of trial, and insane ex-convicts in need of treatment. None of these classes, however, is situated comparably to insanity acquittees. Members of the second group have never been determined to have committed a criminal act evidencing dangerousness. Prisoners and ex-convicts who became insane have not been judicially determined to be mentally ill. And none of these groups consist of people who have been previously adjudicated to have committed a crime as a result of mental illness. Accordingly, the claim of impermissible underinclusiveness is insubstantial.

III. THE MAXIMUM HYPOTHETICAL SENTENCE IS IRRELEVANT TO THE LEGALITY OF PETITIONER'S DETENTION

As we have shown, petitioner's continued dangerous mental illness was established by procedures that comport with due process and are reasonably adapted to the unique situation of an insanity acquittee. Accordingly, the only question that could be raised about the continuation of petitioner's commitment would relate to the release procedures established by law. But, as we have explained (see page 59, note

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because punishment was imposed, in a proceeding separate from the criminal trial, based upon a finding of fact as to the defendant's dangerous propensities which he had not been allowed to litigate. 386 U.S. at 608-610. Here, by contrast, petitioner was afforded a full and fair hearing on the questions on which his commitment turned.

51), petitioner did not challenge these release procedures in the court of appeals, and the court of appeals did not consider any such question. Nor has petitioner taken any appeal from the denial of the application for unconditional release that he filed pursuant to D.C. Code Ann. § 24-301(k) (1973), after the Superior Court had rejected his claim that he was entitled to release because of expiration of the maximum sentence he could have received (see page 15, note 18, *supra*).

The expiration of the maximum sentence that petitioner could have received if convicted is, as the court of appeals recognized (J.A. 42) and as amicus curiae GLSP concedes (Br. 8-11), simply irrelevant to the permissible duration of petitioner's commitment, for, unlike the situation in *Specht* v. *Patterson*, *supra*, *Humphrey* v. *Cady*, 405 U.S. 504 (1972),[55]

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[55] In *Humphrey* the defendant had been convicted of a crime and committed to a sex deviate facility in the state prison in lieu of sentence. Under the Wisconsin statute at issue, such a commitment ran for the duration of the sentence but could be renewed for an unlimited number of five-year terms upon a finding of need for continued treatment at the conclusion of the preceding term. The prisoner challenged his continuing commitment under this statute by petition for a writ of habeas corpus. He argued that, as a matter of equal protection, he was entitled to a jury trial, at least at the hearing held to determine whether his commitment should be renewed. This Court did not adjudicate the merits of this contention, holding merely that petitioner's claim was not so insubstantial as to justify the district court's dismissal of the petition without an evidentiary hearing. 405 U.S. at 508. To be sure, the Court noted the State's suggestion that the difference was justified by the fact that the commitment was merely an alternative form of sentencing, responding (405 U.S. at 510-511; footnote omitted) that the contention

> arguably has force with respect to an initial commitment * * * which is imposed in lieu of sentence, and is

and *McNeil* v. *Director of Patuxent Institution*, 407 U.S. 245 (1972),[36] petitioner's confinement does not rest upon such a conviction. Rather, his commitment rests upon the finding of fact—reached by an appropriate procedure—that he is dangerously mentally ill. The validity of that finding, twice made at the outset of his confinement and reviewable at regular intervals upon petitioner's application, is no more subject to decay over time than the findings upon which other civil commitments rest. Nor is that

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limited in duration to the maximum permissible sentence. The argument can carry little weight, however, with respect to the subsequent renewal proceedings, which result in five-year commitment orders based on new findings of fact, and are in no way limited by the nature of the defendant's crime or the maximum sentence authorized for that crime.

But these comments do not support petitioner's contention that his commitment must terminate with the expiration of his sentence, for petitioner's confinement does not rest upon conviction of a crime, nor is his commitment a sentencing alternative. Rather, while petitioner's commitment was triggered by an acquittal that embodied a finding that petitioner's insanity had produced a criminal act, it rests upon a subsequent finding of mental illness and dangerousness. Moreover, petitioner has had an opportunity for jury review of these key questions. The omission of an opportunity for a jury trial at the 50-day hearing is accordingly permissible.

[36] In *McNeil*, *supra*, the defendant was sentenced to a fixed term upon conviction of a crime and was referred for evaluation of his mental and emotional health on the basis of an *ex parte* judicial determination. The Court concluded that the defendant could not be held for evaluation beyond the end of his five-year sentence, as there had been no judicial determination that confinement beyond that time was warranted. Here, of course, petitioner's confinement rests upon the judicial determination that he presently remains dangerously mentally ill.

finding dissipated by the expiration of the maximum sentence petitioner could have received.[57] There is accordingly no warrant for requiring the government to bear the burden of proving continued dangerous insanity by recommitting insanity acquittees after the passage of a certain amount of time—a right not afforded other civil committees. To do so might well raise equal protection questions more substantial than those suggested by petitioner.

Petitioner seeks to convert the judgment of "not guilty by reason of insanity" into a verdict of "guilty but mentally ill" culminating in a determinate sentence to be served in an appropriate facility. The "guilty but mentally ill" verdict has been adopted by several states as an alternative to the traditional insanity verdict. See, *e.g.*, Mich. Comp. Laws Ann. §§ 768.29a(2), 768.36(3) (West Supp. 1982). We assume this is a permissible policy decision. But that decision is one properly entrusted to the legislative branch. As the court of appeals concluded, Congress did not opt for such a punitive scheme for the District of Columbia. Petitioner's commitment rests upon findings of present insanity and dangerousness warranting confinement and treatment, and not upon any punitive interest. Accordingly, the Court must regard

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[57] As is explained in greater detail in our brief in opposition to the petition (pages 23-27), petitioner's reliance (Br. 28) upon decisions of the District of Columbia Circuit is misplaced. Those decisions were rendered under Section 301(d) as it stood prior to the 1970 amendments designed to cure the defects perceived by the court in *Bolton* v. *Harris*, *supra*, which eliminated any basis for the claim that a commitment rendered under Section 301(d) has a punitive aspect that requires that commitment to be terminated even though the petitioner remains dangerously insane.

Section 301(d) as an alternative means for civil commitment, rather than a sentencing option.

Petitioner's argument takes no account of the unique position of insanity acquittees. He assumes that he must be treated in all respects as a convicted criminal or in all respects as an ordinary civil committee, when in fact he is neither. The District of Columbia procedure for commitment of insanity acquittees provides a procedurally sound means of determining whether the criteria for commitment are satisfied. The differences between these procedures and those prescribed for civil committees are carefully designed to reflect the special position of an insanity acquittee, who has been permitted to escape the penal sanction on the basis of his showing by a preponderance of the evidence that he was afflicted with a dangerous mental illness. The Constitution requires no more.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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JULY 1982

APPENDIX

1. D.C. Code Ann. § 24-301 (1973) provides in pertinent part:

* * * * *

(c) When any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, that fact shall be set forth by the jury in their verdict.

(d) (1) If any person tried upon an indictment or information for an offense raises the defense of insanity and is acquitted solely on the ground that he was insane at the time of its commission, he shall be committed to a hospital for the mentally ill until such time as he is eligible for release pursuant to this subsection or subsection (e).

(2) A person confined pursuant to paragraph (1) shall have a hearing, unless waived, within 50 days of his confinement to determine whether he is entitled to release from custody. At the conclusion of the criminal action referred to in paragraph (1) of this subsection, the court shall provide such person with representation by counsel—

(A) in the case of a person who is eligible to have counsel appointed by the court, by continuing any appointment of counsel made to represent such person in the prior criminal action or by appointing new counsel; or

(B) in the case of a person who is not eligible to have counsel appointed by the

court, by assuring representation by retained counsel.

If the hearing is not waived, the court shall cause notice of the hearing to be served upon the person, his counsel, and the prosecuting attorney and hold the hearing. Within ten days from the date the hearing was begun, the court shall determine the issues and make findings of fact and conclusions of law with respect thereto. The person confined shall have the burden of proof. If the court finds by a preponderance of the evidence that the person confined is entitled to his release from custody, either conditional or unconditional, the court shall enter such order as may appear appropriate.

(3) An appeal may be taken from an order entered under paragraph (2) to the court having jurisdiction to review final judgments of the court entering the order.

(e) Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) of this section, and the superintendent of such hospital certifies (1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital, and such certificate is filed with the clerk of the court in which the person was tried, and a copy thereof served on the United States Attorney or the Corporation Counsel of the District of Columbia, whichever office prosecuted the accused, such certificate shall be sufficient to authorize the

court to order the unconditional release of the person so confined from further hospitalization at the expiration of fifteen days from the time said certificate was filed and served as above; but the court in its discretion may, or upon objection of the United States or the District of Columbia shall, after due notice, hold a hearing at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of one or more psychiatrists from said hospital. The court shall weigh the evidence and, if the court finds that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, the court shall order such person unconditionally released from further confinement in said hospital. If the court does not so find, the court shall order such person returned to said hospital. Where, in the judgment of the superintendent of such hospital, a person confined under subsection (d) above is not in such condition as to warrant his unconditional release, but is in a condition to be conditionally released under supervision, and such certificate is filed and served as above provided, such certificate shall be sufficient to authorize the court to order the release of such person under such conditions as the court shall see fit at the expiration of fifteen days from the time such certificate is filed and served pursuant to this section: *Provided*, That the provisions as to hearing prior to unconditional release shall also apply to conditional releases, and, if, after a hearing and weighing the evidence, the court shall find that the condition of such person warrants his conditional release, the court shall order his release

under such conditions as the court shall see fit, or, if the court does not so find, the court shall order such person returned to such hospital.

* * * * *

(g) Nothing herein contained shall preclude a person confined under the authority of this section from establishing his eligibility for release under the provisions of this section by a writ of habeas corpus.

(h) The provisions of this section shall supersede in the District of Columbia the provisions of any Federal statutes or parts thereof inconsistent with this section.

* * * * *

(j) Insanity shall not be a defense in any criminal proceeding in the United States District Court for the District of Columbia or in the Superior Court of the District of Columbia, unless the accused or his attorney in such proceeding, at the time the accused enters his plea of not guilty or within fifteen days thereafter or at such later time as the court may for good cause permit, files with the court and serves upon the prosecuting attorney written notice of his intention to rely on such defense. No person accused of an offense shall be acquitted on the ground that he was insane at the time of its commission unless his insanity, regardless of who raises the issue, is affirmatively established by a preponderance of the evidence.

(k)(1) A person in custody or conditionally released from custody, pursuant to the provisions of this section, claiming the right to be released from custody, the right to any change in the conditions of his release, or other relief concern-

ing his custody, may move the court having jurisdiction to order his release, to release him from custody, to change the conditions of his release, or to grant other relief.

(2) A motion for relief may be made at any time after a hearing has been held or waived pursuant to subsection (d) (2) of this section.

(3) Unless the motion and the files and records of the case conclusively show that the person is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting authority, grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto. On all issues raised by his motion, the person shall have the burden of proof. If the court finds by a preponderance of the evidence that the person is entitled to his release from custody, either conditional or unconditional, a change in the conditions of his release, or other relief, the court shall enter such order as may appear appropriate.

(4) A court may entertain and determine the motion without requiring the production of the persons at the hearing.

(5) A court shall not be required to entertain a second or successive motion for relief under this section more often than once every six months. A court for good cause shown may in its discretion entertain such a motion more often than once every six months.

(6) An appeal may be taken from an order entered under this section to the court having jurisdiction to review final judgments of the court entering the order.

(7) An application for habeas corpus on behalf of a person who is authorized to apply for relief by motion pursuant to this section shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court having jurisdiction to entertain a motion pursuant to this section, unless it also appears that the remedy by motion is inadequate or ineffective to test the validity of his detention.

2. The District of Columbia Hospitalization of the Mentally Ill Act of 1964, D.C. Code Ann. § 21-501 *et seq.* (1973), provides in pertinent part:

§ 21-545. Hearing and determination by court or jury; order; witnesses; jurors

(a) Upon the receipt by the court of a report [from the Commission on Mental Health reflecting a finding that an individual is dangerously mentally ill] the court shall promptly set the matter for hearing and shall cause a written notice of the time and place of the final hearing to be served personally upon the person with respect to whom the report was made and his attorney, together with notice that he has five days following the date on which he is so served within which to demand a jury trial. The demand may be made by the person or by anyone in his behalf. If a jury trial is demanded within the five-day period, it shall be accorded by the court with all reasonable speed. If a timely demand for jury trial is not made, the court shall determine the person's mental condition on the basis of the report of the Commission, or on such further evidence in addition to the report as the court requires.

(b) If the court or jury, as the case may be, finds that the person is not mentally ill, the court shall dismiss the petition and order his release. If the court or jury finds that the person is mentally ill and, because of that illness, is likely to injure himself or other persons if allowed to remain at liberty, the court may order his hospitalization for an indeterminate period, or order any other alternative course of treatment which the court believes will be in the best interests of the person or of the public. The Commission, or a member thereof, shall be competent and compellable witnesses at a hearing or jury trial held pursuant to this chapter. The jury to be used in any case where a jury trial is demanded under this chapter shall be impaneled, upon order of the court, from the jurors in attendance upon other branches of the court, who shall perform the services in addition to and as part of their duties in the court.

§ 21-546. Periodic requests for examination of hospitalized patient; procedure for examination and detention or release; petition to court

(a) A patient hospitalized pursuant to a court order obtained under section 21-545, or his attorney, legal guardian, spouse, parent, or other nearest adult relative, may, upon the expiration of 90 days following the order and not more frequently than every 6 months thereafter, request, in writing, the chief of service of the hospital in which the patient is hospitalized, to have a current examination of his mental condition made by one or more physicians. If the request is timely it shall be granted. The patient may,

at his own expense, have a duly qualified physician participate in the examination. In the case of such a patient who is indigent, the Department of Public Health shall, upon the written request of the patient, assist him in obtaining a duly qualified physician to participate in the examination in the patient's behalf. A physician so obtained by an indigent patient shall be compensated for his services out of any unobligated funds of Department of Public Health in an amount determined by it to be fair and reasonable. If the chief of service, after considering the reports of the physicians conducting the examination, determines that the patient is no longer mentally ill to the extent that he is likely to injure himself or other persons if not hospitalized, the chief of service shall order the immediate release of the patient. However, if the chief of service, after considering the reports, determines that the patient continues to be mentally ill to the extent that he is likely to injure himself or other persons if not hospitalized, but one or more of the physicians participating in the examination reports that the patient is not mentally ill to that extent, the patient may petition the court for an order directing his release. The petition shall be accompanied by the reports of the physicians who conducted the examination of the patient.

§ 21-547. Judicial determination of petition filed under section 21-546; order; physicians as witnesses

In considering a petition filed under section 21-546, the court shall consider the testimony

of the physicians who participated in the examination of the patient, and the reports of the physicians accompanying the petition. After considering the testimony and reports, the court shall either (1) reject the petition and order the continued hospitalization of the patient, or (2) order the chief of service to immediately release the patient. A physician participating in the examination shall be a competent and compellable witness at any trial or hearing held pursuant to this chapter.

§ 21-548. Periodic examinations by hospital authorities; release

The chief of service of a public or private hospital shall, as often as practicable, but not less often than every six months, examine or cause to be examined each patient admitted to a hospital pursuant to this subchapter and if he determines on the basis of the examination that the conditions which justified the involuntary hospitalization of the patient no longer exist, the chief of service shall immediately release the patient.

§ 21-549. Preservation of other rights to release

Sections 21-546 to 21-548 do not prohibit a person from exercising a right presently available to him for obtaining release from confinement, including the right to petition for a writ of habeas corpus.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MICHAEL JONES, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ Of Certiorari To The District Of Columbia Court Of Appeals

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INTRODUCTION

In 1975, when he was 20 years old, the petitioner, Michael Jones, was arrested for trying to steal an inexpensive coat from a department store. Six months later, at his trial on a charge of petit larceny, he raised an insanity defense, claiming that he should not be blamed for what he had done because it had been the product of a mental illness. The government did not contest his claim, and the trial court found that the petitioner had substantiated it by a preponderance of the evidence. On the basis of this finding, and this finding alone, the petitioner was indefinitely committed to a mental hospital pursuant to 24 D.C. Code § 301(d). He has now been confined for nearly seven years on the basis of that commitment, even though, had he been convicted of attempted petit larceny, he could have been sentenced to at most one year in prison.

Petitioner argued in his main brief that this Court need not decide whether his initial commitment under § 301(d) was constitutional, for even if it was, his continued confinement beyond the one year maximum sentence that could have been imposed upon conviction, is not. This is so, petitioner argued, because if the automatic commitment mechanism of § 301(d) can be justified at all, it is on the theory that § 301(d) is necessary to deter false insanity pleas and to shut the "revolving door" which, Congress feared, permits "dangerous criminals . . . 'to have it both ways' "—to escape both conviction and commitment to a hospital. H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 74 (1970). (Quoted at Pet. Br. 10). This rationale for automatic commitment under § 301(d), however, could not, support an *indefinite* commitment, but, as petitioner argued, only one limited to the maximum sentence that could have been imposed had he been convicted. Once that time had passed, these societal interests were fully vindicated and there was no basis for treating him differently from a putative civil committee. Thus, after one year, the need for his continued commitment had to be proved by the constitutionally required standard of clear and convincing evidence. *Addington* v. *Texas*, 441 U.S. 418 (1979). (Pet. Br. 9-13).

The government's lengthy brief is generously peppered with passages intimating that § 301(d) can be sustained as the partially punitive mechanism Congress clearly intended it to be.[1] But the government chooses not to defend § 301(d) directly on this basis. Instead, it contends that this Court must regard § 301(d) merely "as an alternative means for civil commitment" (Gov. Br. 67-68) whose sole purpose is, like civil commitment under 21 D.C. Code §§ 541-545, simply to confine those who are mentally ill and dangerous. Because the automatic commitment of all insanity acquitees under § 301(d) provides, according to the government, a constitutionally adequate surrogate for an individualized determination of mental

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[1] E.g. "Yet once the acquittee has been permitted to establish his mental illness and its connection with his demonstrated dangerousness by a preponderance of the evidence, without more, society has a *compelling* interest in assigning to the acquittee the burden of proving, with a similar degree of reliability, that these conditions no longer obtain. To impose upon the government the burden of proving by clear and convincing evidence that an insanity acquittee remains dangerously mentally ill would reopen the 'revolving door' shut by Congress through which persons who are more probably than not dangerously mentally ill escape both the criminal sanction and therapeutic commitment. Surely due process does not command any such result." (Gov. Br. 39) (emphasis added).

"Because defendants are permitted to escape criminal responsibility by advocating their own insanity and establishing the same by a mere preponderance of the evidence, it is entirely appropriate to place upon the insanity acquittee the burden of affording reasonable assurance that his release will not cause danger to himself or others because of the very mental disease that produced—and excused—his criminal act." (Gov. Br. 46).

"But in the final analysis this "presumption" rests not solely upon its verisimilitude, but upon the need to maintain the moral integrity of the criminal sanction and of the insanity defense. By purposely availing himself of the insanity defense, petitioner knowingly assumed and thus properly was subjected to the burden established by Section 301(d)." (Gov. Br. 46).

illness and dangerousness by *Addington* standards, the § 301(d) commitment, like a civil commitment, can be of indefinite duration. If § 301(d) cannot be justified as a mode of civil commitment, the government suggests, then it cannot be justified at all, and so even a § 301(d) commitment limited to the maximum sentence that could have been imposed would be invalid. (Gov. Br. 28-29).

By casting its argument in these all-or-nothing terms, the government compels a response that appears to commit petitioner to a position broader than that advanced in his main brief. Petitioner would simply remind the Court that in his view this Court need not decide whether his initial commitment and confinement for one year was constitutional, for he has now been confined for over seven years, and so is entitled to relief.

I. THE DUE PROCESS ISSUE

Before addressing the government's arguments in support of § 301(d), it is essential to clarify two points about how that statute operates. First, § 301(d) requires the automatic, indefinite commitment of all insanity acquitees. At the fifty-day hearing authorized in § 301(d) both the burden of coming forward and of persuasion are placed on the acquitee. The initial indefinite commitment follows automatically from the insanity acquittal. At the fifty-day hearing the government must prove nothing. Thus, under § 301(d), an insanity acquitee is committed indefinitely to a mental hospital without the government's proving the basis for that commitment at all, much less by clear and convincing evidence.

Second, the insanity acquitee's commitment under § 301 is indefinite. It lasts until the acquitee can prove that he is entitled to be released. The acquitee's loss of liberty, then, is in every respect at least as complete as that of an indefinitely committed civil commitee such as the appellant in *Addington*,

whose commitability, this Court held, had to be proven by clear and convincing evidence.[2]

Both petitioner and the amici have argued that § 301 is constitutionally defective because it does not satisfy *Addington*'s requirement that the predicate for commitment be established by clear and convincing evidence. As both petitioner and the amici have pointed out, *Addington* imposes a dual requirement: that the government bear the burden of proof of mental illness and dangerousness, and that it prove those elements by clear and convincing evidence. Both of those requirements are necessary to minimize the risk that an individual will be erroneously committed.

Aside from defending § 301 on its face, the government throws up a two-pronged secondary defense, which petitioner will treat before turning to the government's main argument. First, the government denigrates the importance of the role of both the burden and the standard of proof. As to the burden, the government observes:

> The practical effect of assigning the burden of proof to one party or another is doubtful when the standard of proof is a mere preponderance of the evidence. It is only in the hypothetical case where the evidence is in absolute equipoise that such distinctions matter. (Gov. Br. 45 n. 36).

As to the standard of proof, the government subtley distorts *Addington* by observing that the importance of the standard of proof is "symbolic, if not practical." (Gov. Br. 34).

The government undervalues both the burden and standard of proof. In *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958), this

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[2] In several respects the acquitee's commitment is more oppressive. He is generally assigned to a particularly secure and confining wing of the hospital and both his conditional and unconditional release from the hospital must be approved by the Court. *See* 24 D.C. Code § 301(e). *Compare* 21 D.C. Code § 546 (hospital may release the civilly committed patient without the approval of the court).

Court made clear that "in all kinds of litigation [including civil litigation where the standard of proof is preponderance of the evidence], it is plain that where the burden of proof lies may be decisive of the outcome." This is particularly true in a case such as this, where a highly subjective judgment must be made on the basis of "often unclear, sometimes woefully muddled" testimony. *See* n.3, *infra*. Moreover, the standard of clear and convincing proof is not just of symbolic importance. As this Court has pointed out, the clear and convincing standard not only focuses the factfinder's attention on the quality rather than the quantity of the evidence, *Santosky* v. *Kramer*, 102 S.Ct. 1388, 1400 (1982), but it also instructs the factfinder that he must be more confident in a factual conclusion in favor of the party bearing the burden of proof than would be required in an ordinary civil case. *Addington* v. *Texas*, 441 U.S. 418, 423, citing *In Re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., Concurring). The clear and convincing standard has been recognized as an important instrument shifting the risk of error away from one party and toward the other.

Insanity acquitees, then, are doubly deprived by § 301(d). The statute does not merely relieve the government of establishing the predicate for the acquitee's commitability with the quality of evidence, and to the degree of certitude, required by the clear and convincing standard, it relieves it of the burden of proving commitability at all.

Though it disparages the importance of the clear and convincing standard of proof, and trivializes the significance of shifts in the burden of proof and of persuasion, the government concedes that § 301(d) "on its face" does indeed appear to shift these burdens to "the insanity acquitee facing commitment." (Gov. Br. 45). But as the second prong of its secondary defense, the government argues that even though § 301(d) did not require it to do so, in the petitioner's case it did in fact "shoulder the burden of proof" at the petitioner's fifty-day hearing. (Gov. Br. 43). Hence, the government contends, the shifts in the burden of proof and persuasion under § 301(d) are "not before the Court . . . for they were not actually employed in petitioner's case." (Gov. Br. 45).

But clearly they are before the Court. The trial judge at the fifty-day hearing was operating under a statute that directed him to order release only if the petitioner brought forth evidence sufficient to convince him that the petitioner was not mentally ill and dangerous. 24 D.C. Code § 301(d)(2). There is simply no basis in the record here to assume that the Court at the fifty-day hearing continued the petitioner's commitment on any basis other than petitioner's failure to do so. That he put his "findings" in affirmative terms is immaterial. Indeed, the same "findings" were apparently made at the later release hearing challenged here, even though at that hearing no evidence whatsoever was adduced by either party. (J.A. 10).

The government goes on to suggest that even if petitioner could not be committed except on the basis of clear and convincing evidence, he cannot complain here that the trial court's findings were not "tied explicitly to the standard of clear and convincing evidence" because "the *only* evidence presented was that petitioner remained mentally ill and dangerous to himself or others." (Gov. Br. n.34.) The government's emphasis on the quantity rather than the quality of the evidence is plainly wrong. *See Santosky* v. *Kramer*, 102 S.Ct. at 1400. There is little reason to suppose that the trial court would have found the quality of the psychologist's testimony—particularly on the question of the petitioner's dangerousness—either clear or convincing. (*See* Pet. Br. 2-3). Moreover, harmless error reasoning is simply inapplicable in burden of proof and standard of proof cases. *See*, e.g., *Sandstrom* v. *Montana*, 442 U.S. 510, 526 (1979).

Nor is it relevant that petitioner's counsel failed "to challenge, by cross examination or presentation of conflicting testimony, the conclusions of the government's expert witnesses at the fifty-day hearing . . . ." (Gov. Br. n.34). At the time of that hearing, petitioner had already been confined for over eight months, and the only case law in the District of Columbia indicated that after the petitioner had been confined for one year, the need for his continued confinement would have to be proved by the government in a civil commitment proceeding. *See United States* v. *Brown*, 155 U.S. App. D.C. 402, 478 F.2d

606 (1973); *Waite* v. *Jacobs*, 154 U.S. App. D.C. 281, 475 F.2d 392 (1973). Thus petitioner's counsel could not anticipate that the fifty-day hearing would take on the significance that the government would have this Court attribute to it.

The bulk of the government's brief, however, is not taken up with this secondary defense, which seeks simply to justify the petitioner's commitment on the basis of facts peculiar to his case. Rather, it is devoted to a defense of § 301(d) on its face. As we have seen, it is clear that under that statute, the insanity acquitee, unlike the civil commitee, is indefinitely committed to a mental hospital without any individualized proof—much less proof by clear and convincing evidence—that he belongs there. Instead, the burden is on him to prove that he does not. Thus he, rather than the state, is made to bear the risk of error in the resolution of an issue where that risk is inherently high[3] and the stakes to the individual are enormous.

This glaring disparity in treatment, the government argues in its brief, is justified by relevant differences between the class of insanity acquitees and the class of putative commitees. The government is limited, however, by self-imposed restraints, for it is wedded to the position that the purpose of the two procedures is precisely the same: to commit those, and only those, who are currently mentally ill and dangerous. It follows, then, that the fact that acquitees have been found to have committed a criminal act can be accorded only evidentiary significance. That is, the past criminal act cannot, on the government's theory, itself supply the basis for even a limited

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[3] The judgment which must be made is necessarily highly subjective, and must be made on the basis of inherently fallible diagnoses and predictions and often unclear and "woefully muddled" psychiatric testimony. Hence, allocation of the burden of proof, and the standard of proof required, are likely to be outcome determinative. *See Waite* v. *Jacobs*, 154 U.S. App. D.C. 281, 284, 475 F.2d 392, 395 (1973). For a classic study of the difficulty which psychologically normal investigators had talking their way out of mental hospital, see Rosenhan, *On Being Sane in Insane Places*, 179 *Science* 250 (1973).

commitment, but is relevant only to the degree that it indicates dangerousness at the time of the commitment proceedings.

Nevertheless, at one point in its brief the government suggests that it was the very fact that the petitioner had been found to have committed a criminal act, while Frank Addington had not, that justified petitioner's commitment without proof that he was mentally ill and dangerous by *Addington* standards. (Gov. Br. 31 and n.25). But *Addington* cannot be distinguished in this way, for surely it is immaterial whether or not Addington was found in a *separate* judicial proceeding to have committed a criminal act. At the civil commitment hearing itself, Addington did not contest the State's assertion that he had recently been involved in several assaultive episodes, had caused substantial property damage, and had repeatedly, and recently, threatened to injure both his parents and others. Indeed, he also conceded that he was mentally ill. Nevertheless, this Court held, the State was required to prove the contested predicate for his commitment—dangerousness—by clear and convincing evidence. *Addington* v. *Texas*, 441 U.S. at 420-421. All Michael Jones did was try to steal a coat, yet the government would accord him less procedural protection than Frank Addington on the ground that he is not a "civil" commitee.

In light of the fact that petitioner is demonstrably less dangerous than Frank Addington, it is not surprising that the government for the most part shies away from discussing the facts of petitioner's case, and instead attempts to explain why insanity acquitees as a class are different from putative civil commitees. It does so by playing a seemingly endless series of variations on what are essentially three themes.

First, though insanity acquitees seem to be treated less favorably, in fact the risk that the acquitee will be erroneously committed under § 301(d) is, all things considered, not significantly greater than that a putative civil commitee will be erroneously committed at a proceeding at which his commitability is established by *Addington* standards. The government's argument here is that § 301(d) cannot be considered in

isolation, but must be viewed as part of an "integrated scheme" which, taken as a whole, will result in tolerably accurate results. (Gov. Br. 30-31). The idea seems to be that even though the insanity acquitee is committed without clear and convincing evidence that he is mentally ill and dangerous, this deficiency is compensated for by the fact that he has been proven beyond a reasonable doubt to have committed a dangerous act, been found to have been mentally ill at that time, and is later, at the fifty-day hearing, given a lawyer and an opportunity to prove that he should be released. (Gov. Br. 32 and 36).

As petitioner will show, this line of argument depends on the validity of several indefensible presumtions. But aside from its inherent unpersuasiveness, this approach to the issue is precisely that which this Court rejected in *Santosky* v. *Kramer*, *supra*, 102 S.Ct. at 1396 n.9. There is even more reason to reject it here, for it is clear that the risk that the individual will be erroneously committed under § 301(d) is not significantly mitigated either by the trial that precedes commitment or by the fifty-day hearing that follows it.

Second, even if the risk that an individual who deserves to be free will be confined is greater under § 301(d), this is constitutionally acceptable because the stakes for the acquitee are not so high, and for the state are higher, than they are for putative civil commitees. (Gov. Br. 37-40).

Third, the government argues, the higher risk of an erroneous commitment borne by the insanity acquitee is "appropriate" because he knew that he would be made to run this risk when he chose to raise an insanity defense in the first place, and therefore can fairly be required to accept it. (Gov. Br. 46).

These rationales, whether considered separately or cumulatively, cannot justify the indefinite commitment of insanity acquitees on the basis of the acquittal alone.

(1) On the government's view the only justification for committing an insanity acquitee is that he is currently committable, i.e. mentally ill and dangerous. We can be sufficiently

sure that he is currently mentally ill, the government argues, because the factfinder at his criminal trial found by a preponderance of the evidence that he was mentally ill when he committed the criminal act. Though the government vehemently resists admitting that § 301(d)'s validity depends in any way on the adequacy of any presumptions (Gov. Br. at 43-48), it is obvious that proof of a mental illness at the time of the offense can constitutionally substitute for proof of mental illness at the time of commitment only if the presumption of continuing mental illness is a constitutionally permissible one.[4]

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[4] The government suggests that petitioner's reliance on such presumption cases as *Sandstrom* v. *Montana*, *supra*, and *Leary* v. *United States*, 395 U.S. 6 (1969), is misplaced because those are criminal cases, and this is a civil case. (Gov. Br. n. 35). But obviously presumptions must pass a stringent test of reasonableness in any situation where they might otherwise be used to circumvent a constitutionally required burden of proof. *See Speiser* v. *Randall*, *supra*, 357 U.S. at 526. *Addington* sets such a burden for civil commitment cases. The government cannot, therefore, argue that *Addington* is satisfied because presumptions sufficiently eliminate the risk of error, and at the same time argue that the reasonableness of the presumption can simply be assumed as an unsubstantiated "teaching of common experience" (Gov. Br. 46) because this is not a criminal case. It is also absurd to argue that the fifty-day hearing does not involve reliance on presumptions, when the mandatory presumption that an insanity acquittal establishes mental illness and dangerousness is inherent in the very fact that at the hearing the acquitee bears the burden of going forward and of persuasion. In a particularly obscure argument, the government contends that a § 301(d) commitment is not based on any presumptions because the "*findings* arrived at in the prior criminal trial [are] the very facts said to be 'presumed' at the fifty-day hearing." (Gov. Br. 47). But the factfinder at the criminal trial is not asked to make a judgment one way or the other about whether the defendant's mental illness continued beyond the time of his criminal act; whether he was mentally ill at the time of trial; whether he was dangerous when he committed the criminal act; or whether he was dangerous at the time of trial.

The presumption of continuing insanity is unsupportable. To begin with, the wide variation in the duration of possible mental illnesses, and the quick and effective treatability of many, count strongly against inferring continuing mental illness in all cases,[5] particularly when there is likely to have been a long period of hospitalization and treatment between the acquitee's arrest and trial.[6] Moreover, the insanity acquittal merely shows that mental illness was found, by a preponderance of the evidence, to have existed with respect to one particular act at one particular time in the past. Indeed, as the District of Columbia Court of Appeals has said, an insanity acquittal under the prevailing formulation of the insanity defense is ultimately more a "social or moral judgment about whether a man should or should not be held accountable" for his criminal act, than a medical conclusion. *Bethea* v. *United States*, 365 A.2d 64, 76 (D.C. 1976), *cert. denied*, 433 U.S. 911 (1977). But the existence of a mental illness for civil commitment purposes is, quintessentially, a medical judgment, and not, one hopes, a "social and moral one." *Addington* requires that the existence of such an illness at the time of commitment be proved by clear and convincing evidence.

But even if the probability requirements for a presumption of continuing mental illness were met, the presumption would still be unfair to individual acquitees. Individualized justice—where the individual's liberty is at stake—requires direct proof of facts instead of actuarial reasoning except in unusual circumstances. No such circumstances are present here. Mental ill-

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[5] See Amicus Brief for the American Civil Liberties Union at 12-13, and sources cited therein.

[6] In petitioner's case, he was hospitalized for six months between his arrest and trial. In most cases, the delay is likely to be far longer. And, because the Speedy Trial Act, 18 U.S.C. 3161 *et. seq.*, does not apply in Superior Court, the government is wrong in suggesting that it affords protection against long delayed insanity acquittals. (Gov. Br. n. 43.).

ness is determined diagnostically, not predictively, and is susceptible to direct proof. Moreover, following the fifty-day observation period,[7] the state surely is in a better position to prove current mental illness if it exists than the acquitee is to disprove it if it does not.[8]

(2) The government's argument that proof of a past criminal act serves as a sufficiently accurate surrogate for proof of current dangerousness obviously also depends on the validity of a presumption. Like the presumption of continuing mental illness, this presumption of dangerousness is unsupportable. To begin with, while it may be true that an "affirmative finding of the past commission of a dangerous act anchors the commitment decision in a way that is not *inherent* in civil commitment proceedings . . ." (Gov. Br. 36) (emphasis added), this difference cannot justify § 301(d)'s mandatory presumption of current dangerousness from a single past criminal act. Virtually all involuntary civil commitments are initiated because the putative civil commitee has engaged in some form of criminal conduct.[9] In *Addington* itself, the putative commitee conceded a series of violent acts in the recent past, and it was apparently a criminal assault which spawned the commitment proceedings. Nevertheless this Court required that Addington's cur-

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[7] Petitioner has never challenged the propriety of committing insanity acquitees for a complete mental examination to enable the government to decide whether to initiate civil commitment proceedings.

[8] *Compare Santosky* v. *Kramer*, *supra*, where this Court required the state to adduce clear and convincing evidence in another context in part because the state's "ability to assemble evidence inevitably dwarfs the ability of [the individual] to mount a defense." 102 S.Ct. at 1399. See also Note, *Rules for An Exceptional Class: the Commitment and Release of Persons Acquitted of Violent Offenses by Reason of Insanity*, 57 N.Y.U.L. Rev. 281 (1982).

[9] *See Benham* v. *Edwards*, 501 F. Supp. 1050, 1069 (N.D. Ga. 1980), *affirmed*, 678 F.2d 511 (5th Cir. 1982). Where no "overt" criminal act is involved, a criminal threat of some sort is.

rent dangerousness be proved by clear and convincing evidence, though he conceded past acts of violence. Thus while proof of a past criminal act may not be *inherent* in civil commitment proceedings, such proof is virtually always present. Were this Court to accept the government's arguent here, the clear, straightforward and compelling teaching of *Addington* would have to be abandoned upon the slightest procedural variations.[10]

But more important, proof of a past criminal act merely "anchors" a commitment decision to another floating ship unless it can be shown that proof of a single criminal act is itself securely moored to current dangerousness. And it is not. When Congress enacted the present statutory scheme, it did not cite any empirical evidence indicating that mentally ill persons who have committed a criminal act are likely to commit additional dangerous acts in the future. In fact, the relevant available evidence suggests that only a small percentage of persons who have been found mentally ill and have engaged in past criminal behavior commit additional criminal or violent acts.[11]

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[10] In *Baxstrom* v. *Herold*, 383 U.S. 107 (1966), for example, this Court struck down an abbreviated New York procedure for committing incarcerated convicts indefinitely as mentally ill. That procedure also applied only to individuals whose past criminal conduct had been proven in a way not inherent in civil commitment proceedings. This Court ruled that this difference did not justify a watered down commitment proceeding for convicts. Nor would it justify watering down the due process requirements of *Addington*. Yet on the government's cramped reading of *Addington*, that decision would not control, and an entirely new balancing process would have to be undertaken.

[11] *See* Amici Briefs of The American Civil Liberties Union, at 13-17 and The New Jersey Department of Public Advocate, at 28-38 and sources cited therein. For the most recent studies, see Pasewark, Pantle, and Steadman, *Detention and Rearrest Rates of Persons Found Not Guilty By Reason of Insanity and Convicted Felons*, 139

Thus, even if the government is correct in its claim that current research suggests that violent criminal conduct is "the most powerful available indicator of a high probability of future dangerous conduct" (Gov. Br. 49-50), that research would not support § 301(d)'s mandatory presumption of dangerousness, for it is a very weak indicator at least.

More importantly, the state is, of course, free to use evidence of past conduct to prove current dangerousness. At a commitment proceeding following an insanity acquittal, the acquitee's criminal acts would be admissible on the issue of dangerousness, and in many instances the factfinder would doubtless conclude that this evidence established dangerousness clearly and convincingly. But the significance of past criminal conduct to the prediction of dangerousness surely varies from case to case, and the government has advanced no reason—much less a "compelling one" (Gov. Br. 39)—why the acquitee is not entitled to an individualized determination of dangerousness before he can be committed indefinitely.

Finally, the petitioner here engaged in no violent conduct whatever, yet he was committed indefinitely under § 301(d)'s implicit mandatory presumption of dangerousness. On the government's own reading of the empirical research, it is only violent conduct that can serve as a valid indicator of dangerousness. There is simply no support whatsoever in that research for the proposition that a single, non-violent, criminal act is a reliable basis for a prediction of future dangerousness. Thus, even if the government's very doubtful argument is correct that any conduct defined as criminal by the legislature constitutes the sort of danger to the community upon which an indefinite commitment to a mental hospital can be predicated

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Am. J. Psychiatry 892, 895 (1982); Pasewark, Pantle, and Steadman, *Comparing Institutionalization Periods and Subsequent Arrests of Insanity Acquitees and Convicted Felons*, [1980] Journal Psychiatry & Law 305, 313.

(Gov. Br. 53-54),[12] petitioner's non-violent act would not justify his commitment as dangerous. Clearly that act did not establish such dangerousness by the clear and convincing evidence that *Addington* requires.

(3) The government contends that this Court should reject the petitioner's argument that the basis for the indefinite commitment of an insanity acquitee must be established by clear and convincing evidence because, while such a ruling would benefit those who are actually acquitted, it would harm the class of prospective insanity acquitees. (Gov. Br. 37-39). This is so, the government suggests , because Congress would likely respond to a ruling in petitioner's favor by raising the criminal defendant's burden of proving insanity to proof by clear and convincing evidence so that an indefinite commitment could then follow automatically from it, thereby closing once again the revolving door that this Court would have reopened by its decision.[13] This argument should be rejected for several reasons. To begin with, all petitioner is asking the

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[12] On this view, a defendant who is acquitted by reason of insanity of, for example, vagrancy or trespass, could, under § 301(d), be automatically committed indefinitely. Not only that, but so long as his mental illness was likely to cause him to continue in his wandering ways, he would, it seems, be dangerous to others, and therefore never entitled to release. Similarly, even without a criminal conviction, a person whose mental illness made it likely that he would wander onto another's property could be civilly committed and confined until he could prove that this "danger" to others no longer persisted.

[13] Much of what is said about revolving doors betrays a fundamental misunderstanding of the law in this area. Even if this Court were to uphold § 301(d) as applied to petitioner, some people acquitted by reason of insanity, even of violent crimes, would be neither punished nor committed. For if the acquitee can affirmatively prove at the fifty-day hearing that he is no longer mentally ill or dangerous, he is entitled to immediate release. Conversely, even if this Court rules that automatic indefinite commitment under 301(d) is invalid,

Court to do is to rule that, having been confined for longer than he could have been upon conviction, he is now entitled to relief. Such a ruling would open no revolving door. Moreover, whether or not Congress chooses for other reasons to raise the burden on criminal defendants to prove insanity, doing so would have little or no effect on the validity of an automatic indefinite commitment following an insanity acquittal. The constitutional argument against such a commitment turns primarily on the fact that what is demonstrated by an insanity acquittal is insufficiently *probative* to justify automatic, indefinite commitment, not that it is insufficiently *proved* at the criminal trial. Finally, this argument simply misses the point of the petitioner's due process claim: that he has never been proved to be committable by the constitutionally required standard of proof, and thus is entitled to release if that standard cannot now be met.[14]

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petitioner, and other acquitees, will not necessarily be released. All the government must do to continue the acquitee's confinement is to prove the need for that confinement by the constitutionality required standard of proof.

[14] The government's argument here is one that could be made for the denial of virtually all due process claims: if the Court holds that procedural protections are constitutionally required before an individual can be denied a statutory entitlement, the legislature may eliminate the entitlement altogether. *Ergo*, the due process claim should be rejected. A somewhat similar argument can be raised against all equal protection claims; if the Court rules that legislation burdens one group unfairly, the legislature may rewrite it to burden all alike.

The fact is, the petitioner's mental illness was never proved by clear and convincing evidence as *Addington* requires. Whether or not Congress could or would establish a procedure whereby an insanity acquittal did demonstrate mental illness by such a standard is simply beside the point. Petitioner's rights should not be denied him on the basis of conjecture and speculation about how Congress might react to a decision in his favor.

(4) The government argues that even if there is a greater risk of an erroneous commitment under § 301(d) than in a civil commitment proceeding, this is an acceptable risk because acquitees have less at stake than putative civil commitees. This is alleged to be so because "there is little incremental stigma attaching upon civil commitment to an insanity acquitee who by then has already been found to have been recently mentally ill and dangerous." (Gov. Br. 40).[15]

Even assuming insanity acquitees and putative civil commitees can be distinguished generally in terms of the incremental stigma of commitment, which is doubtful,[16] the unquestionably more significant liberty interests at stake far overshadow concerns about potential stigmatization. And the possible loss of liberty from wrongful commitment is the same for both groups.[17] Except on some partially punitive rationale,

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[15] At this point in its brief the government cites *Addington*, where, it would seem, the "incremental stigma" of an eighth commitment in six years was likely to be less than devastating to Frank Addington's reputation in his community. While *Addington* involved a balancing process, it was, petitioner submits, a process which led the Court to reach the conclusion that before an individual can be committed indefinitely to a mental hospital, the need for that commitment must be proved by clear and convincing evidence. This is so even though in particular cases, such as *Addington* itself, many of the factors that led the Court to that conclusion are likely to be missing.

[16] An insanity acquittal is simply a finding that the defendant was not morally responsible for a particular act because he was mentally ill at the time of the act. This is very different from the "statement" implicit in confining a person to a mental hospital as dangerous to society. Moreover, it is the hospitalization itself that may constitute the most devastating stigma.

[17] In *Warren* v. *Harvey*, 632 F.2d 925 (2d Cir.) *cert. denied*, 449 U.S. 902 (1980), the Court upheld automatic commitment for insanity acquitees. While it mentioned differences in stigmatization, it recognized that loss of liberty was a far more significant interest. It upheld automatic commitment on a quasi-punitive rationale.

which the government pointedly declines to advance,[18] the insanity acquitee's liberty interest is precisely the same as that of a putative civil committee—if he is not currently mentally ill and dangerous he is entitled to immediate release[19]—and his erroneous commitment to a mental hospital is every bit as offensive. Indeed, *Vitek* v. *Jones*, 445 U.S. 480 (1980), teaches that even a properly convicted criminal has a significant interest in not being committed to a mental hospital. An acquitee, who will otherwise be free, obviously has a far greater interest.

(5) The government argues that unlike the Texas procedure struck down in *Addington*, § 301(d) "reflects a broad social consensus that the unique circumstances of an insanity acquitee justify confidence in the reliability of a commitment decision reached without requiring clear and convincing evidence of illness and future dangerousness," and "that accordingly 301(d) is consistent with the requirements of due process." (Gov. Br. 42).

To begin with, this "broad social consensus" simply does not exist. While twelve years ago only three states required that commitment procedures for insanity acquitees meet civil

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[18] The government hints, but does not quite argue, that the governmental interest in committing mentally ill and dangerous insanity acquitees is greater than its interest in committing others who are dangerously mentally ill. (Gov. Br. 36). If there is such a greater interest which would justify allocating the risk of error to the acquitee, it can only be based on a rationale that attributes more than evidentiary significance to the criminal act. If such a greater interest does exist, it is, as petitioner argued, fully vindicated once the acquitee has been confined as long as he could have been upon conviction, and the risk of error must then be borne by the government. (Pet. Br. 11-13, 30).

[19] Petitioner recognizes that an automatic short term commitment following an insanity acquittal would be justifiable while the government determined whether it wished to initiate civil commitment proceedings.

commitment standards, now at least nineteen do, and several additional states require civil commitment where, as in petitioner's case, the criminal charge is a misdemeanor. Only about a dozen states, it seems, require automatic indefinite commitment for all insanity acquitees, as § 301(d) does. *See* Note, *Commitment Following an Insanity Acquittal*, 94 Harv. L. Rev. 605, 605-606, nn.3-6 (1981). And the trend in state courts has clearly been toward affording greater protections to insanity acquitees. *See* cases cited in Pet. Br. n. 19, and *see In re Moye*, 584 P.2d 1097 (Cal. 1978). This hardly represents a broad social consensus.

Moreover, those states which do authorize automatic commitment do not necessarily share the government's confidence in the reliability of automatic commitment. Rather, it is more likely that they regard the automatic commitment of insanity acquitees as justifiable on the quasi-punitive principles which the author of the source cited by the government terms "the cleanup doctrine." *See* Note, *supra*, 94 Harv. L. Rev. at 617-622. Yet the government does not argue for the validity of the petitioner's commitment on this basis.

(6) The government does not make an independent argument that indefinite automatic commitment under § 301(d) is constitutional because the defendant, by raising an insanity defense, assumes the risk that he will be erroneously committed. Nevertheless, a submerged but recurrent theme running through the government's brief is that because the petitioner himself raised an insanity defense his automatic commitment is somehow appropriate, for he "knowingly assumed and thus properly was subjected to the burden established by Section 301(d)." (Gov. Br. 46). But an insanity acquitee is properly subject to the burden *only* if that burden is otherwise reasonable. If it is not, then the burden represents an unconstitution-

al condition on the exercise of a right. Thus the government's argument here simply begs the question.[20]

Moreover, this argument is particularly unfair as applied to the petitioner here. When he raised his insanity defense in 1976, the only case law in the District of Columbia[21] indicated that if he was confined for one year, the maximum sentence he could have received for attempted petit larceny, he would then be entitled to a hearing at which the government would have to prove his commitability beyond a reasonable doubt.[22]

(7) A similar argument, which the government seems to endorse in a footnote and evidently wants this Court to consider, but will not advance as its own, is that the automatic commitment of insanity acquitees is justified by "society's interest in discouraging false insanity pleas."[23] (Gov. Br. 39

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[20] There is, moreover, no logical inconsistency in raising an insanity defense—a claim by the defendant that he should be absolved of responsibility for a prior criminal act—and later contesting current mental illness and dangerousness. Though under traditional evidence law the acquitee's prior pleadings would be admissible against him at the later proceeding, they would not be afforded extraordinary evidentiary weight. McCormick on Evidence 635 (2d Ed. 1972).

Contrary to the government's suggestion (Gov. Br. 46), there is no affront to the integrity of the courts, the criminal sanction, or the insanity defense when this occurs. And the government can have no moral claim or justifiable interest in a procedure that increases the risk of erroneously committing those who have met the burden of proving that they were entitled to an acquittal.

[21] *See supra* at 6-7.

[22] In the District of Columbia at that time, the government at a civil commitment proceeding was required to prove mental illness and dangerousness beyond a reasonable doubt. *In re Hodges*, 325 A.2d 605 (D.C. 1974). Now it must prove commitability by clear and convincing evidence. *In re Nelson*, 408 A.2d 1233 (D.C. 1979).

[23] Except in the rare case of a wholly fabricated insanity defense, it is far from clear precisely what a false insanity plea really is, for both mental illness and culpability generally exist in varying degrees. In

n.30). As petitioner has suggested, automatic commitment under § 301(d) could arguably be justified as a mechanism to deter false insanity pleas and to assure that those who undeservedly obtain an insanity acquittal are confined.[24] But this rationale for automatic commitment under § 301(d) cannot justify confining the insanity acquitee for longer than he could have been confined had he not raised an insanity defense at all, and been convicted.[25]

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any case, as a device for deterring false insanity pleas, harsh post-acquittal provisions are subject to challenge as overinclusive in that they will necessarily deter valid insanity pleas as well. Limiting confinement under a § 301(d) commitment to the maximum sentence that could have been imposed upon conviction would substantially mitigate this problem of deterring valid insanity please. Indeed, relatively harmless but mentally disturbed defendants charged with misdemeanors are precisely those who should feel free to raise an insanity defense without fearing an undue risk of an unnecessarily long confinement in a mental hospital. Surely if this Court decides this case against petitioner, a defendant charged with a misdemeanor who is mentally ill and needs treatment will be exceedingly reluctant to plead insanity.

[24] In *United States* v. *Brown*, *supra*, the court recognized that modern formulations of the insanity defense "call for the acquittal of persons who may have meaningful elements of responsibility." 155 U.S. App. D.C. at 407, 478 F.2d at 611. For this reason, the court upheld automatic commitments limited in time to the sentence that could have been imposed upon conviction. *See also* Note, *supra*, 94 Harv. L. Rev. at 624, where the author suggests that the urge to punish insanity acquitees stems from the belief that their acts necessarily involve some element of choice, and that harsh post-acquittal commitment procedures express the belief that all insanity defenses are in some sense false.

[25] Ironically, the supposition underlying the notion that § 301(d) would in fact succeed in deterring some false insanity pleas is in direct conflict with the main thrust of the government's brief. Under § 301(d)(2), the acquitee who can demonstrate that he is not mentally ill or dangerous is entitled to immediate release. Thus, if the government is indeed right that § 301(d) procedures involve little risk of

(8) The government also argues that considerations of judicial economy and integrity make it permissible to allocate the burden of proof to the acquitee to rebut the effect of the findings at the criminal trial. (Gov. Br. 47). This argument is misplaced. In cases where there is a factual basis for a presumption, then a shift in the burden of proof may effect savings in judicial energy without unnecessary risk to important individual rights. Here, there will be no saving in judicial time: each side will almost certainly still present the same evidence as it otherwise would.[26]

II. The Equal Protection Issue

The petitioner's claim that he was denied equal protection is essentially congruent with his claim that he was denied due process. That is, if he has been denied due process, he has also been denied equal protection; while if he has not been denied due process, it can only be on the basis of reasoning that would defeat his equal protection claim as well. If petitioner's due

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error that sane acquitees will be confined, the sane but clever criminal defendant who contemplates manufacturing an insanity defense has little to fear. All he need to do to gain his release is show that he had feigned his insanity. Thus § 301(d) can work as a deterrent to manufactured pleas only on the supposition that sane aquitees will in fact be confined persuant to it because of their inability to prove their sanity. This, of course, is precisely what the government argues elsewhere in its brief will not occur.

[26] The cases cited by the government in support of this argument (Gov. Br. 47) are inapposite. They deal with the question of whether a party is entitled to relitigate an issue actually determined against him in a prior procedure. If relitigation is denied, there will indeed be a savings of judicial resources. That saving is justified only because the party had a full and fair opportunity to litigate the issue at the prior proceeding. Here, as the government properly concedes, there is no suggestion that an insanity acquitee could be denied the right to litigate the issue of whether he is dangerously mentally ill. It has not previously been decided.

process rights were violated, however, there is one, separate issue raised by his equal protection claim: whether he has the right, like putative civil committees in the District of Columbia, to have his commitability determined by a jury. Resolution of that issue might well turn on the level of judicial review which this Court determines to be appropriate. Even if this Court determines that, despite the liberty interest at stake, strict scrutiny is not required, the classification here requires a more convincing justification than do social and economic classifications.

Indeed, though the cases relied on by petitioner, such as *Baxstrom* v. *Herold*, 383 U.S. 107, *Jackson* v. *Indiana*, 406 U.S. 715 (1972), and *Humphrey* v. *Cady*, 405 U.S. 504 (1972), may have used rationale basis language, the results which this Court reached in those cases are more readily explainable in terms of an intermediate level of review. *See* Gunther, The Supreme Court, 1971 Term—*Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972); *Cf. Plyler* v. *Doe*, 102 S.Ct. 2382 (1982).

For the reasons advanced in his main brief, petitioner submits that now that he has been confined for as long as he could have been incarcerated upon conviction, there is, on whatever level of review is used, no adequate basis to deny him a hearing with all the procedural safeguards, including the right to a jury trial, afforded to putative civil commitees in the District of Columbia.

CONCLUSION

On the government's own theory, the petitioner's indefinite commitment to St. Elizabeths hospital can be predicated only on the basis of a dangerous mental illness. In *Addington* this Court required that the predicate for such a commitment had to be proved by clear and convincing evidence. The petitioner's dangerousness and mental illness have never been proved at all, but presumed solely from the fact that a judge agreed with his claim that he could not be morally blamed for trying to steal

a coat six months before. His committability has not been proved in the six years since, yet he remains confined. As every day passes he is denied his constitutional rights. Unless the government can now prove the need for his commitment at a civil commitment proceeding, he is entitled to be released.

Respectfully submitted,

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v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the District of Columbia Court of Appeals

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION FUND OF THE NATIONAL CAPITAL AREA, *AMICI CURIAE*, IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does it violate due process of law to confine a person acquitted of a criminal offense by reason of insanity ("acquittee") involuntarily and indefinitely in a mental institution without requiring the Government to bear the burden of establishing that the person is currently mentally ill and likely to be dangerous to himself or others in the reasonable future?

2. Does it deny an acquittee the equal protection of the laws to confine him involuntarily and indefinitely in a mental institution without affording him the same procedural protections that are available to all other persons facing involuntary commitment?

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION FUND OF THE NATIONAL CAPITAL AREA, *AMICI CURIAE*, IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

The American Civil Liberties Union ("ACLU") is a non-partisan, non-profit membership organization dedicated to the protection of civil liberties through a vigorous defense of the fundamental principles embodied in the Bill of Rights. The American Civil Liberties Union Fund of the National Capital Area ("Fund") is the Washington, D.C. area litigation arm of the ACLU. The ACLU and the Fund have frequently appeared in this Court and in other courts, as counsel for the parties and as *amici*, in cases raising due process and equal protection challenges to Federal and State governmental actions that curtail personal liberty.

This case challenges the constitutionality of the District of Columbia's statutory procedures for the involuntary and indefinite institutionalization of persons acquitted of criminal offenses on the ground of insanity. The decision below upheld those procedures. Affirmance of that decision would significantly curtail the liberty of acquittees in the District of Columbia, as well as in other jurisdictions that employ similar procedures.[1] Affirmance would also undermine the constitutional right to personal liberty generally, by holding—for the first time ever in peacetime—that the Government need not bear the burden of justifying the involuntary confinement of its citizens. We are therefore submitting this brief urging reversal of the decision below.[2]

STATEMENT

A. The Statute

In the District of Columbia, any person charged with a criminal offense—whether misdemeanor or felony—may plead not guilty by reason of insanity. At the time petitioner came to trial, a person raising the insanity defense had to prove, by a preponderance of the evidence, that his crime was a "product of mental disease or mental defect."[3]

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[1] *See* Note, *Commitment Following an Insanity Acquittal*, 94 Harv. L. Rev. 605, 605-06 nn. 4 & 5 (1981).

[2] The parties have consented to our filing this brief. Their letters of consent have been filed with the Clerk.

[3] *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954). On September 27, 1976, the District of Columbia Court of Appeals abandoned the *Durham* test and adopted the so-called ALI test, in which the accused must prove, by a preponderance of the evidence, that at the time of the offense (1) he was suffering from a mental disease or defect, and (2) as a result of the disease or defect, he lacked substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. *Bethea v. United States*, 365 A.2d 64 (D.C. 1976), *cert. denied*, 433 U.S. 911 (1977).

The analysis in this brief would apply with equal force if the ALI test had been in effect at the time of petitioner's trial.

Under Section 301(d) of Title 24 of the District of Columbia Code (hereinafter "Section 301(d)"), every person acquitted of a criminal offense solely on the ground that he was insane at the time of the offense (an "acquittee") "shall be committed to a hospital for the mentally ill until such time as he is eligible for release . . . ." Section 301(d)(1). The commitment is mandatory and automatic; the acquittee does not receive a pre-commitment hearing.

In lieu of a pre-commitment hearing, an acquittee is entitled to receive, within 50 days after his confinement commences, a hearing "to determine whether he is entitled to release from custody." Section 301(d)(2)(A). The acquittee is entitled to release if the court finds that the acquittee either (1) has recovered his sanity or (2) will not in the reasonable future be dangerous to himself or others.[4]

There is no jury at a release hearing; the court determines the issues and makes findings of fact and conclusions of law. Section 301(d)(2)(B). Nor does the Government bear the burden of proof at a release hearing: "The person confined shall have the burden of proof." *Id.* Thus, the mandatory and automatic post-acquittal commitment will continue indefinitely unless the acquittee carries the burden of proving current sanity or lack of dangerousness.

These same two criteria—current mental state and likelihood of danger to self or others—are also the statutory criteria for civil commitment determinations in the

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[4] Although these criteria are set forth in Section 301(e), the District of Columbia Court of Appeals has construed Section 301(d) as incorporating them. *See Jones v. United States*, 432 A.2d 364, 372 n.16 (D.C. 1981).

District of Columbia.[5] Civil commitment procedures, however, differ substantially from the procedures at a Section 301(d) release hearing. A civil commitment proceeding involves a two-stage process. Whenever civil commitment is sought, the D.C. Commission on Mental Health is required to hold a hearing at which the respondent has the right to counsel, to testify and present evidence, and to cross-examine witnesses. Based upon the evidence adduced at this hearing, the Commission makes an initial determination of commitability *vel non*. D.C. Code §§ 21-541 through 544. If the Commission determines that the respondent is currently mentally ill and likely to cause injury unless confined, the respondent has a statutory right to a *de novo* jury trial on both issues. *Id.* §§ 21-544 and 545. He may not be committed unless the jury finds that he is both currently mentally ill and likely to injure himself or others unless confined. *Id.* § 21-545(b). The party seeking the commitment bears the burden of proof on both points and at both stages.[6]

B. The Facts

Petitioner was arrested on September 19, 1975, while trying to shoplift an overcoat in a department store. He was 20 years old at the time.

Petitioner was charged with attempted petit larceny—a misdemeanor carrying, upon conviction, a maximum jail term of one year. D.C. Code §§ 22-103, 22-2202. At his arraignment, petitioner was committed to St. Elizabeths Hospital for a period of observation directed to determin-

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[5] *See* D.C. Code §§ 21-541 *et seq.*; *Jones v. United States*, 432 A.2d at 372 & n.16.

[6] On its face, the statute is silent on the burden of proof in civil commitment proceedings. It is nevertheless settled that the burden of proof rests with the party seeking to commit. *See, e.g., In re Nelson*, 408 A.2d 1233 (D.C. 1979) (clear and convincing evidence required).

ing his competency to stand trial. *See* D.C. Code § 24-301(a). On March 1, 1976, the hospital reported to the Superior Court that petitioner was competent and that, despite evidence of a mental disorder, he did not require inpatient hospitalization.

In a non-jury proceeding on March 12, 1976, the trial court entered a judgment of not guilty by reason of insanity on the basis of stipulated facts concerning the offense and petitioner's mental condition at the time of the offense. Petitioner was thereupon automatically committed to St. Elizabeths pursuant to Section 301(d)(1).

Petitioner's release hearing pursuant to Section 301(d)(2) was held on May 25, 1976.[7] The court found that petitioner was currently mentally ill and dangerous, and it denied him release.

On November 29, 1976, petitioner moved for release or, in the alternative, a civil commitment hearing, on the ground that his confinement in St. Elizabeths had exceeded the maximum term he could have served had he been found guilty of the misdemeanor. The motion was denied, and this case arises from petitioner's appeal of the denial.

SUMMARY OF ARGUMENT

Section 301(d) permits an acquittee to be confined in a mental hospital involuntarily, and kept there indefinitely, without requiring the Government ever to shoulder the burden of proving that he is presently mentally ill and

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[7] As we understand it, petitioner does not challenge here the power of the Government to detain him following acquittal for a brief period—such as the 50 days provided in Section 301(d)(2)(A)—for observation to permit the Government to decide whether it should institute civil commitment proceedings. *See McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 249 (1972).

dangerous, as it must to commit any other person involuntarily. That Section also denies an acquittee the right to have a jury decide whether he is presently ill and dangerous, which is a right provided to all others under the District of Columbia civil commitment statute.

Section 301(d) violates a fundamental tenet of due process—that a person may not be deprived of his liberty unless the Government bears the burden of justifying the deprivation. This constitutional defect cannot be cured by invoking a presumption, triggered by the insanity acquittal, of continuing mental illness and dangerousness. The factors relevant to involuntary commitment are not explored at a criminal trial. Moreover, available evidence indicates that mental illness is often not of a continuing nature and that acquittees only infrequently engage in subsequent dangerous behavior. Nor can the defect be justified as a measure needed to protect society from the truly dangerous.

Section 301(d) also denies acquittees the equal protection of the laws, because it deprives them of important procedural protections available in civil commitment proceedings. This discriminatory treatment cannot be justified by any relevant differences between acquittees and civil committees. The Government has the same interests with respect to both groups—to provide treatment for the mentally ill and to protect society from persons likely to be dangerous. This Court has held that a conviction does not justify confining a mentally ill offender beyond his sentence term without affording him a civil commitment hearing. It is irrational to treat acquittees differently.

ARGUMENT

Petitioner is a young man who was arrested for trying to shoplift a coat. Acquitted by reason of insanity at the time of the offense, he was automatically and involuntarily confined in a mental institution pursuant to Section 301(d) of Title 24 of the D.C. Code. Petitioner is still there. He has been there now for six years, even though the maximum prison term he could have served if convicted is only one year.

Under Section 301(d), the Government has never had to shoulder the burden of justifying petitioner's involuntary confinement, even though the Government must shoulder that burden in civil commitment proceedings. Moreover, petitioner has never been afforded a jury determination on the issues of current mental illness and dangerousness, even though a jury determination on these issues is available as a matter of right in civil commitment proceedings. These features render Section 301(d) unconstitutional.

This Court has not hesitated to strike down procedures for indeterminate and involuntary confinement when they do not sufficiently safeguard protected liberty interests, or when they impermissibly discriminate between different classes of persons. Thus, in *Addington v. Texas*, 441 U.S. 418 (1979), the Court held that civil commitment procedures violate due process unless they require the State to carry the burden of proving current mental illness and dangerousness by clear and convincing evidence. And in *Baxstrom v. Herold*, 383 U.S. 107 (1966), the Court held that it denies equal protection for the State to commit a convicted offender to a mental institution at the end of his prison term without affording him the procedural protections of a civil commitment proceeding.[8]

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[8] The Court has struck down other such procedures in *Specht v. Patterson*, 386 U.S. 605 (1967); *Jackson v. Indiana*, 406 U.S. 715

The Court has not yet addressed the constitutionality of procedures governing post-trial commitment of persons acquitted on a plea of not guilty by reason of insanity. Nevertheless, the Court has noted that other courts have followed *Baxstrom* in cases involving commitment following an insanity acquittal. *See Jackson v. Indiana*, 406 U.S. at 724.[9]

This case, involving petitioner's confinement for an indeterminate period that has already far exceeded the maximum prison sentence he could have received, presents the question whether the District of Columbia's procedures for commitment following an insanity acquittal pass muster under the due process and equal protection clauses. The Court should hold that the procedures violate both clauses.

(1972); *McNeil v. Director, Patuxent Institution*, 407 U.S. 245 (1972); and *Vitek v. Jones*, 445 U.S. 480, 494-96 (1980).

Most of these decisions (including *Baxstrom*) were unanimous. In none of them did any Justice dissent on the merits of the constitutional holding.

[9] Since *Jackson*, additional courts have followed *Baxstrom* in constitutional challenges to post-acquittal commitment procedures. *E.g., Allen v. Radack*, 426 F. Supp. 1052, 1057-58 (D.S.D. 1977); *State v. Clemons*, 110 Ariz. 79, 515 P.2d 324 (1973) (en banc); *Wilson v. State*, 259 Ind. 375, 287 N.E.2d 875 (1972); *People v. McQuillan*, 392 Mich. 511, 221 N.W.2d 569 (1974); *State v. Krol*, 68 N.J. 236, 344 A.2d 289 (1975); *Holderbaum v. Watkins*, 42 Ohio St. 2d 372, 328 N.E.2d 814, 815 (1975) (per curiam); *Kovach v. Schubert*, 64 Wis. 2d 612, 219 N.W.2d 341 (1974), *appeal dismissed*, 419 U.S. 1117, *cert. denied*, 419 U.S. 1130 (1975). *But see In re Franklin*, 7 Cal. 3d 126, 496 P.2d 465, 101 Cal. Rptr. 553 (1972) (en banc); *Mills v. State*, 256 A.2d 752 (Del. 1969); *Chase v. Kearns*, 278 A.2d 132 (Me. 1971); *In re Torsney*, 47 N.Y.2d 667, 394 N.E.2d 262, 420 N.Y.S.2d 192 (1979).

I. SECTION 301(d) DEPRIVES INSANITY ACQUITTEES OF LIBERTY WITHOUT DUE PROCESS OF LAW.

A. Section 301(d) Violates the Principle That No Person May Be Deprived of His Liberty Unless The Government Bears the Burden of Establishing That The Deprivation Is Justified.

Involuntarily confining an acquittee unquestionably curtails liberty interests protected by the due process clause. Protected liberty interests are implicated when a convicted and currently incarcerated criminal offender is involuntarily transferred from prison to a mental hospital. *Vitek v. Jones*, 445 U.S. 480, 487-91 (1980). *A fortiori*, protected liberty interests are implicated when the Government seeks to confine, involuntarily and indefinitely, a person who was acquitted by reason of insanity and is thus not under sentence. Such confinement is "a massive curtailment of liberty." *Humphrey v. Cady*, 405 U.S. 504, 509 (1972) (footnote omitted). It "constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. at 425.

It is a fundamental principle of due process that the Government may not curtail an individual's protected liberty interests without first carrying the burden of showing that the curtailment is justified. This principle is implicit in the Court's prior holdings that, in a variety of situations, the Government may not infringe a person's protected liberty interests unless it establishes justification by a strict standard of proof.[10] The principle is fur-

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[10] *See, e.g., Addington v. Texas*, 441 U.S. 418 (1979) (State must establish civil commitability by clear and convincing evidence); *In re Winship*, 397 U.S. 358 (1970) (Government must establish guilt beyond a reasonable doubt in juvenile delinquency proceedings); *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 285 (1966) (Government must establish grounds for deportation by clear and convincing evidence); *Schneiderman v. United States*, 320 U.S. 118, 125, 159 (1943) (Government must establish grounds for denaturalization by clear and convincing evi-

ther supported by *Speiser v. Randall*, 357 U.S. 513 (1958), which held that a statute violated due process by placing the burden of proof on an individual, rather than on the Government, on an issue that implicated "an interest of transcending value." *Id.* at 525.

The District of Columbia procedure for the post-trial confinement of acquittees violates this principle by relieving the Government of its burden of justifying the confinement and by imposing on acquittees the burden of establishing that they are entitled to be free. For this reason, Section 301(d) denies acquittees due process of law.

B. There Is No Constitutionally Adequate Justification For Shifting the Burden of Proof to the Person Sought To Be Confined.

None of the reasons advanced by the court below or the Government suffices to justify imposing on an acquittee the burden of proving that his involuntary confinement is not warranted.

1. *The Shift in the Burden Cannot Be Justified by the Verdict of Not Guilty By Reason of Insanity.*

The court below erred in viewing a release hearing under Section 301(d)(2) as a mere "updating" of the verdict of not guilty by reason of insanity. *See* 432 A.2d at 373. The verdict involves a finding that, at the time the accused committed the act, he was suffering from a mental disease or defect, and that the act was a product of the disease or defect. By contrast, the inquiry in a Section 301(d)(2) release hearing is whether, at the time

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dence); *Nishikawa v. Dulles*, 356 U.S. 129 (1958) (Government must prove grounds for expatriation by clear and convincing evidence).

While these cases all involved the question of what standard of proof the Government must meet, in each case there was no question that the Govenrment—and not the individual—bears the burden of proof.

of the hearing, the acquittee is mentally ill and likely to be dangerous in the reasonable future. The two inquiries are different; the latter therefore cannot "update" the former.

Because the verdict focuses on the defendant's mental state at the time of the criminal act, it may or may not be probative of whether the acquittee is mentally ill at the time of the release hearing. *See* pp. 12-13, *infra*. More importantly, because probable future dangerousness is not an issue at the trial, no finding as to probable dangerousness is inherent in a verdict of not guilty by reason of insanity. To be sure, the facts relating to the past act may constitute evidence bearing on probable future dangerousness (*see* p. 18, *infra*), but the inquiry into dangerousness is a very different one from the inquiry undertaken at the criminal trial.

For these reasons, the court below was wrong in asserting that a Section 301(d) release hearing is "an updating process to determine how present mental status compares with earlier findings which had been urged by the defendant himself . . . ." 432 A.2d at 373, *quoting* 396 A.2d at 189. There are no such "earlier findings." Shifting the burden of proof to the acquittee cannot be justified on that basis, and to do so would be arbitrary. *See Baxstrom v. Herold*, 383 U.S. at 114 n.5.

2. *The Shift in the Burden Cannot Be Justified By Invoking a Presumption of Continuing Insanity and Dangerousness.*

The court below also sought to justify the allocation of the burden of proof in a Section 301(d)(2) release hearing by invoking mandatory rebuttable presumptions of continuing insanity and dangerousness triggered solely by the fact of acquittal on insanity grounds. *See* 432 A.2d at 371, 374. But constitutional requirements may not be so easily side-stepped:

> "It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a

> statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions."

Speiser v. Randall, 357 U.S. at 526, *quoting Bailey v. Alabama*, 219 U.S. 219, 239 (1911).

Presumptions, even if rebuttable, violate due process "unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary v. United States*, 395 U.S. 6, 36 (1969); *see also County Court v. Allen*, 442 U.S. 140, 165 (1979).[11] The presumptions of continuing mental illness and dangerousness fail this test.

The presumption of continuing insanity is unsupportable. A determination that an acquittee suffered from a mental illness at the time he committed a criminal act does not by itself support an inference that he will still be suffering from that illness at the time of the release hearing. Many months, and sometimes years, may pass between the commission of the criminal act and the trial,[12] not to mention the release hearing,[13] and all or part of

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[11] The Court has also held that irrebuttable statutory presumptions which effectively curtail personal liberty violate the due process clause. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 644-46 (1974) (presumption that woman five months pregnant cannot teach safely or effectively violates Due Process Clause); *Vlandis v. Kline*, 412 U.S. 441, 446 (1973) (invalidating presumption of nonresidency for tuition purposes); *Stanley v. Illinois*, 405 U.S. 645 (1972) (presumption that unwed father is unfit parent invalid).

[12] *See, e.g., Bolton v. Harris*, 395 F.2d 642 (D.C. Cir. 1968) (14 months between offense and trial); *Hough v. United States*, 271 F.2d 458 (D.C. Cir. 1959) (more than one year between indictment and trial); *O'Beirne v. Overholser*, 193 F. Supp. 652 (D.D.C. 1961) (10 months between offense and trial), *rev'd*, 302 F.2d 852 (D.C. Cir. 1962).

[13] *E.g., Warren v. Harvey*, 472 F. Supp. 1061 (D. Conn. 1979) (34 months between arrest and commitment hearing after trial),

that time may be spent in treatment.[14] Some mental illnesses are of short duration,[15] and many illnesses, including various psychotic illnesses, respond well to drug treatment and can be quickly and effectively brought under control.[16]

The presumption of continuing dangerousness also lacks foundation. When Congress enacted the present statutory scheme, it did not cite any empirical evidence indicating that mentally ill persons who have committed a criminal act are likely to commit additional dangerous acts in the future. In fact, the relevant available evidence strongly suggests that only a small percentage of persons who are found to be mentally ill and have engaged in past criminal behavior commit additional criminal or violent acts.[17] And it certainly cannot be said with "substantial as-

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affirmed, 632 F.2d 925 (2d Cir.), *cert. denied*, 449 U.S. 902 (1980); *Curry v. Overholser*, 287 F.2d 137 (D.C. Cir. 1960) (more than 15 months between indictment and commitment).

[14] *E.g.*, *Warren v. Harvey*, *supra*, 472 F. Supp. at 1063 (two years in hospital); *Bolton v. Harris*, *supra*, 395 F.2d at 645 (five months in hospital undergoing chemo- and psychotherapy, discharged as recovered); *Curry v. Overholser*, *supra*, 287 F.2d at 138 (13 months in hospital to restore competency), *Hough v. United States*, *supra*, 271 F.2d at 459 (11 months in hospital to restore competency).

[15] For example, "[o]ver 80 per cent of patients [suffering from schizophrenic psychoses] who require admission to hospital will be discharged in the first year of treatment." L. Kolb, Modern Clinical Psychiatry 421 (9th ed. 1977). Manic-depressive psychotic reactions often respond effectively to drug treatment from 3 to 21 days after treatment begins. *Id.* at 464. In severe cases, requiring electroshock therapy, many patients recover after three to four weeks of treatment. *Id.* at 466. Even if it is untreated, an average manic-depressive episode will last only six to nine months, with individual cases being much shorter. *Id.* at 464.

[16] *See* German & Singer, *Punishing the Not Guilty: Hospitalization of Persons Acquitted by Reason of Insanity*, 29 Rutgers L. Rev. 1011, 1019 & n.33 (1976) (citing authorities).

[17] *See* pp. 14-16, *infra*.

surance" that the presumption of future dangerousness is more likely than not to flow from the fact of a prior acquittal by reason of insanity. *Cf. Leary v. United States*, 395 U.S. at 36.

In recent years, impressive empirical evidence has been collected concerning the likelihood that mentally ill persons who have committed criminal acts will commit harmful acts in the future.[18] The uncontradicted evidence shows that only a relatively small percentage of such persons will either be rearrested or readmitted to mental institutions as a result of dangerous or violent behavior. For example, Steadman and Keveles studied 967 patients transferred from two New York State hospitals for the criminally insane to civil mental hospitals in 1966 as the result of this Court's decision in *Baxstrom*.[19] Of those 967 patients, 246 were released into the community within the four-year follow-up period of the study; and out of a sample of 121 of them, only 21 (or 17.4 percent) were subsequently arrested, and only two (or 1.7 percent) were convicted of felonies.[20] Similar findings were reported by Thornberry and Jacoby,[21] who studied 586 patients transferred from a Pennsylvania hospital for the criminally

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[18] Methodological difficulties unavoidably handicap investigation of the actual subsequent dangerousness of persons acquitted by reason of insanity. Although some acquittees may be released to the community shortly after acquittal, substantial numbers of acquittees are committed to mental institutions and, as a result, have no real opportunity to demonstrate their actual dangerousness or non-dangerousness. Therefore, the best available evidence of the actual dangerousness of acquittees is found in follow-up studies of both acquittees and prisoners formerly confined in mental hospitals and since released into the community.

[19] Steadman & Keveles, *The Community Adjustment and Criminal Activity of the Baxstrom Patients: 1966-1970*, 129 Am. J. Psychiatry 304 (1972).

[20] *Id.* at 307, 310.

[21] T. Thornberry & J. Jacoby, The Criminally Insane: A Community Follow-up of Mentally Ill Offenders (1979).

insane to civil mental hospitals.[22] Prior to the transfers, staff recommendations had been made that the patients could not be cared for in less secure civil hospitals and would be dangerous if released to the community.[23] Nevertheless, of the 414 patients released into the community during the four-year follow-up period of the study, only 98 (or 23.7 percent) were subsequently arrested,[24] and only 60 (or 14.5 percent) were arrested for a violent act or rehospitalized as a result of violent behavior.[25]

These studies and others[26] demonstrate the correctness of the conclusion of a 1974 report of the American Psy-

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[22] The transfers resulted from a federal court decision that the commitments had been unconstitutional. *Dixon v. Attorney General*, 325 F. Supp. 966 (M.D. Pa. 1971).

[23] T. Thornberry & J. Jacoby, *supra*, at 23.

[24] *Id.* at 179.

[25] *Id.* at 190.

[26] In relative terms, as well, mentally ill persons who have committed criminal acts are not particularly likely to commit additional criminal acts in the future as compared with other groups in the population. While Steadman and Keveles observed a subsequent arrest rate of 17.4 percent, and Thornberry and Jacoby found a subsequent arrest rate of 23.7 percent (and violent behavior rate of 14.5 percent) among former mental patients who had committed criminal acts, Giovannoni and Gurel observed that approximately 14 percent of former civil mental patients were involved in "socially disruptive behavior" in the four years after release. Giovannoni & Gurel, *Socially Disruptive Behavior of Ex-Mental Patients*, 17 Arch. Gen. Psychiatry 146, 147-48 (1967). By way of further comparison, Gottfredson and his associates found an overall recidivism rate, including rearrest and parole violation, for paroled prisoners of 25 percent in the first year after release. D. Gottfredson, M. Neithercutt, J. Nuffield & V. O'Leary, Four Thousand Lifetimes: A Study of Time Served and Parole Outcomes (1973), cited in T. Thornberry & J. Jacoby, *supra*, at 185. And Wolfgang and his associates discovered that 12.7 percent of all males studied were apprehended for at last one serious offense before they reached 17 years of age. M. Wolfgang, R. Figlio & T. Sellin, Delinquency in a Birth Cohort 125 (1972).

chiatric Association's Task Force on Clinical Aspects of the Violent Individual that

> "[F]ollow-up studies of patients discharged from psychiatric hospitals, have given mixed results, but none would indicate any likely potential for violence on the basis of psychiatric disorder." [27]

Beyond this, the available literature also shows that even when trained professionals attempt to predict the future dangerousness of mentally ill offenders on the basis of individualized, multivariate data, they substantially overstate the number of persons that will actually engage in violent or criminal behavior in the future.[28] *A fortiori*, a blanket, undifferentiated presumption that all insanity acquittees will engage in dangerous behavior in the future is a vast overstatement. Indeed, even assuming that as many as 25 percent of all acquittees would actually be dangerous in the future (a more pessimistic assumption than any of the available data supports), the presumption

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[27] American Psychiatric Association, Clinical Aspects of the Violent Individual 30 (1974).

[28] *See, e.g.*, T. Thornberry & J. Jacoby, *supra*, at 195; Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 Rutgers L.Rev. 1084 (1976); Steadman, *Follow-Up on Baxstrom Patients Returned to Hospitals for the Criminally Insane*, 130 Am. J. Psychiatry 317 (1973); Kozol, Boucher & Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 Crime & Delinquency 371 (1972); Hunt & Wiley, *Operation Baxstrom After One Year*, 124 Am. J. Psychiatry 974 (1968); *see also* American Psychiatric Association, *supra*, at 25 ("Psychiatrists, in order to be safe, too often predict dangerousness, especially in the case of the mentally ill offenders."); Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U.Pa.L. Rev. 439, 447 (1974) ("One can only conclude that psychiatrists . . . tended to over-predict dangerousness greatly, by a factor somewhere between ten and a hundred times the actual incidence of dangerous behavior."); Rubin, *Prediction of Dangerousness in Mentally Ill Criminals*, 27 Arch. Gen. Psychiatry 397, 397-98 (1972) ("Even in the most careful, painstaking, laborious and lengthy clinical approach to the prediction of dangerousness, false positives may be at a minimum of 60% to 70%.").

of continuing dangerousness would still be incorrect 75 percent of the time—or three times as often as it would be correct.

For both of these reasons, the presumption of continuing dangerousness plainly fails to satisfy the due process requirement of *Leary v. United States*, *supra*, that the presumed fact must flow from the proven fact "more likely than not." [29]

3. *The Shift in the Burden Cannot Be Justified By Asserting an Overriding Interest in Protecting Society From Acquittees.*

Finally, the Government argues that the shift in the burden of proof can be justified by balancing the requirements of due process against an asserted governmental interest in not "reopen[ing] the 'revolving door' by which persons proven both dangerous and mentally ill escape both punishment and treatment." [30] This argument is wrong because (as discussed at pp. 10-11, *supra*) acquittees

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[29] Relying upon much of the empirical evidence cited herein, the Supreme Court of New Jersey invalidated a New Jersey statutory procedure for the commitment of acquittees that required only a finding of continuing insanity and not dangerousness as well. *State v. Krol*, 68 N.J. 236, 344 A.2d 289 (1975). The court held that the statute violated due process and equal protection, in part, by presuming future dangerousness based solely upon present mental illness and past criminal conduct, a presumption that the court found unwarranted:

> "The fact that defendant is presently suffering from some degree of mental illness and that at some point in the past mental illness caused him to commit a criminal act, while certainly sufficient to give probable cause to inquire into whether he is dangerous, does not, in and of itself, warrant the inference that he presently poses a significant threat of harm, either to himself or to others."

344 A.2d at 295 (footnote omitted); *see also Benham v. Edwards*, 501 F. Supp. 1050 (N.D. Ga. 1980).

[30] Brief of United States in Opposition to Petition for Certiorari ("Br. in Opp.") at 17.

have not been proven either currently mentally ill or dangerous. Beyond that, the argument has other serious flaws.

Requiring the Government to carry the burden of justifying confinement will not open any "revolving door." It will not create an "exclusionary rule" or otherwise disable the Government in any way from demonstrating the need to commit any acquittee. The Government will remain free to introduce all relevant evidence at the release hearing, including, for example, expert psychiatric evidence, evidence concerning the nature of the offense, and evidence of violent propensities, other criminal or antisocial behavior (both before and after the crime charged), and past psychiatric treatment or commitment. Thus, the Government will be fully armed to prevail in any case in which an acquittee is demonstrably mentally ill and dangerous.

There is an even more fatal flaw in the Government's reasoning. Contrary to the Government's assertion,[31] this Court has never used a "balancing analysis" based on some perceived "public interest" to relieve the Government of the burden of justifying deprivations of personal liberty during peacetime. Certainly the Court did not do so in *Addington*—the only case cited by the Government. To be sure, the Court did perform a balancing analysis in *Addington*. But the issue in that case was not whether the Government could constitutionally be relieved of the burden of proof; all parties agreed that the Government must shoulder the burden. The question in *Addington* was what standard of proof the Government must meet—preponderance, clear and convincing, or beyond a reasonable doubt. It was on that question, and that question only, that this Court balanced competing interests. *See* 441 U.S. at 427.[32]

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[31] *See* Br. in Opp. at 17.

[32] The same is true of other cases in which the Court has considered what standard of proof the Government must meet in order to carry its burden. *See* p. 9, n.10, *supra*. In none was the

We submit that the Government may never involuntarily confine its citizens without carrying the burden of affirmatively justifying the need for confinement in each case. But in any event, the Government certainly should not be allowed to balance away a fundamental constitutional freedom on the basis of vague and unsupported assertions of a "revolving door."

II. SECTION 301(d) DENIES INSANITY ACQUITTEES THE EQUAL PROTECTION OF THE LAWS.

The Equal Protection Clause forbids a state to "withhold from a few the procedural protections or the substantive requirements for commitment that are available to all others." [33] While "[e]qual protection does not require that all persons be dealt with identically, . . . it does require that a distinction made have some relevance to the purpose for which the classification is made." [34] Applying those principles, the Court has held that a statutory procedure for the involuntary commitment of mentally ill prisoners nearing the expiration of their sentences violated equal protection because it denied them the opportunity for a *de novo* jury review like that available to all other persons facing civil commitment. *Baxstrom v. Herold*, 383 U.S. at 110. The Court has also invalidated, on equal protection grounds, a statutory scheme that subjected persons charged with crimes but found incompetent to stand trial to "a more lenient commitment standard and to a more stringent standard of release" than those

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balancing directed to considering whether the burden of proof could constitutionally be shifted to the person whose liberty interests the Government was seeking to curtail. *See, e.g., In re Winship*, 397 U.S. at 365-67; *Woodby v. Immigration and Naturalization Service*, 385 U.S. at 285-86.

[33] *Jackson v. Indiana*, 406 U.S. at 727, *citing Baxstrom v. Herold*, 383 U.S. at 111.

[34] *Baxstrom v. Herold*, 383 U.S. at 111.

generally applicable to all persons not charged with criminal offenses. *Jackson v. Indiana*, 406 U.S. at 730.[35]

Section 301(d) denies equal protection to acquittees. It deprives them of important procedural protections accorded as of right in civil commitment proceedings, even though this difference in treatment cannot be justified.

A. Section 301(d) Denies Acquittees Important Procedural Protections Available in Civil Commitment Proceedings.

Acquittees in the District of Columbia are treated differently from persons civilly committed, in that acquittees must bear the burden of proof to obtain release and are not permitted a jury trial on the issues of current mental illness and dangerousness. Indeed, the disparity is even more pronounced, because civil committees are given two bites at the apple on these issues—one before the D.C. Mental Health Commission and a second before a jury—while acquittees get no bites at all.

The court of appeals erred in characterizing these procedural differences as not "substantial." *See* 432 A.2d at 373. Allocation of the burden of proof is important because a person's freedom may hinge on it, as likely occurred in this case.[36] As this Court has stated, "In all

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[35] *See also Humphrey v. Cady*, 405 U.S. 504 (1972) (remanding for evidentiary hearing petitioner's "substantial" claim that commitment for compulsory treatment under Wisconsin's Sex Crimes Act, without the jury determination available to others committed for compulsory treatment under the Mental Health Act, deprived him of equal protection of the laws).

[36] The evidence at petitioner's release hearing was in apparent conflict. The only evidence offered was the testimony of a clinical psychologist from St. Elizabeths. She testified that petitioner was "very quiet" and "pleasant, polite, kind of low key" (Transcript of May 25, 1976 Hearing, at 6); that "he carries out projects in an acceptable fashion" (*id.* at 7); that "he is positively motivated" (*id.*); that "he is very self-a-facing [sic] individual" (*id.* at 8-9)

kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." *Speiser v. Randall*, 357 U.S. at 525 (citations omitted). *See also Waite v. Jacobs*, 475 F.2d 392, 395 (D.C. Cir. 1973).

The opportunity for a jury determination of the need for commitment is also of great importance. The jury, chosen from the community, is the best judge of who may be dangerous to the community. As this Court has recognized, the jury performs the "critical function of introducing into the [commitment] process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment." *Humphrey v. Cady*, 405 U.S. at 509.

B. There Is No Constitutionally Adequate Justification For Denying Acquittees Important Procedural Protections Afforded to Civil Committees.

1. *The Governmental Interests Are the Same in Both Cases.*

The Government has the same underlying interests in the involuntary commitment of acquittees as it does in the involuntary civil commitment of other persons—namely, to provide treatment for the mentally ill and to protect society from persons likely to be dangerous in the reasonable future. *See, e.g., Jones v. United States*, 432 A.2d at 368, *quoting Hough v. United States*, 271 F.2d 458, 461 (D.C. Cir. 1959). The identity of governmental

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who "does not create any problems" and "doesn't get into any difficulty" (*id.*); and that "[i]n short he is not always responsive in a positive way to what goes on but there are positive features" (*id.* at 7). The psychologist also stated that petitioner had had some hallucinations (*id.* at 8), and that on one occasion he "caused the therapy assistant some anxiety" by ignoring the assistant's "advice" to apply a coat of lacquer to a piece of copper craft work (*id.* at 7). She diagnosed petitioner's mental condition as "schizophrenia paranoid type" (*id.* at 9), and opined that "he is still a danger to himself and to others" (*id.*) and would try to shoplift again if released (*id.* at 10).

interests is manifested by the fact that the statutory criteria are the same in both cases—current mental illness and likely future dangerousness. *Compare* D.C. Code § 24-301(e) *with id.* § 21-545(b).

The identity of governmental interests cannot be undercut by suggesting—as the Government has done through its "revolving door" argument (*see* pp. 17-19, *supra*)—that the disadvantageous procedural treatment of acquittees is justified by a penal or punitive interest not present in the case of other persons facing civil commitment. As the court below correctly stated, "The exclusively remedial and protective goals of the statute demonstrate that a punitive rationale has no part in the commitment of persons acquitted by reason of insanity," and "the commitment scheme for acquittees is not intended to attribute any guilt or imply any social indebtedness in the excuse of a criminal offense." 432 A.2d at 369, 376. Moreover, any penal or punitive intent would be improper. As the court below again correctly stated, "Society may not excuse a defendant's criminal behavior because of his insanity and at the same time punish him for invoking an insanity defense." *Id.* at 369.

2. An Acquittee's Prior Criminal Act Does Not Justify Denying Him Procedural Protections Available to All Civil Committees, Including Prior Criminal Offenders.

The fact that an insanity acquittee has been found to have committed a criminal act does not provide a rational basis for affording him fewer procedural protections during the commitment process than are available to other mentally ill persons. This Court has held that where a jury determination is "generally available to persons subject to commitment for compulsory treatment," such a determination may not constitutionally be denied to a person simply because he has been convicted of a criminal offense—even though the fact of the offense may well "be a relevant factor in evaluating his mental condition, and

in determining the type of care and treatment appropriate . . . ." *Humphrey v. Cady*, 405 U.S. at 508, *discussing Baxstrom v. Herold*, *supra*.

There is no merit to the suggestion of the court below that the discriminatory treatment of acquittees can be justified on the basis of a presumption of continuing dangerousness triggered by the commission of a criminal act.[37] Under the District of Columbia procedures, persons with prior criminal records who are no longer under sentence enjoy the full procedural protections of the civil commitment process.[38] Yet those protections are denied to persons who have been automatically confined following acquittal by reason of insanity. Thus, under the approach of the court below, petitioner loses procedural rights because he is presumptively dangerous by virtue of having tried to shoplift a coat. Yet a previously convicted rapist who has nearly completed his sentence, or an armed robber with multiple prior convictions who is not now under sentence, is not presumptively dangerous and is afforded those rights.

This result is totally irrational. Even if the presumption of continuing dangerousness did not violate due process, *see* pp. 13-17, *supra*, it would still violate equal protection because, as in *Baxstrom*, "all semblance of rationality of the classification, purportedly based upon criminal propensities, disappears." 383 U.S. at 115.

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[37] Nor can the discriminatory treatment be justified by the erroneous assertion that the release hearing merely "updates" the trial inquiry. *See* pp. 10-11, *supra*.

[38] Civil commitment procedures are also followed in the case of individuals apprehended in connection with criminal offenses whom the apprehending authorities choose initially to divert to hospitalization rather than the criminal justice process, either on the basis of information concerning prior hospitalizations or by virtue of the nature of the criminal acts committed. *See, e.g.*, T. Thornberry & J. Jacoby, *supra*, at 189; German & Singer, *supra*, at 1023; Steadman & Keveles, *supra*, at 309.

Section 301(d) leaves petitioner in a no-man's land. Because he was found not guilty by reason of insanity, he has been denied procedural protections that are available both to persons not charged with crimes and also to persons who have been convicted. This discriminatory treatment is arbitrary and irrational, and Section 301(d) should therefore be struck down.

C. Petitioner Was Denied Equal Protection By Being Involuntarily Confined Without a Procedurally Adequate Commitment Hearing for Longer Than the Maximum Sentence He Could Have Served if Convicted.

Petitioner has now been involuntarily confined for six years as the result of being found not guilty by reason of insanity of a charge carrying a maximum sentence of one year. Yet he has never received a commitment hearing like those available to all other persons involuntarily committed in the District of Columbia.

There is no conceivable justification for this situation. Obviously the Government's "revolving door" argument cannot justify continuing to discriminate against an acquittee beyond the time when his maximum sentence would have expired. Moreover, if petitioner had been convicted of a crime, incarcerated, and then involuntarily committed as mentally ill and dangerous, he could not, under *Baxstrom*, have been confined beyond the expiration of his sentence without being afforded a full commitment hearing. But there is no rational basis for reaching different results in the two situations: the governmental interests are the same with respect to acquittees and convicted offenders who may be mentally ill and dangerous—to provide treatment and to protect society. *See* pp. 21-22, *supra*. Petitioner was therefore denied equal protection by being deprived of procedural rights that would have been available to him upon expiration of his sentence if he had been adjudged criminally responsible for his conduct.

CONCLUSION

The District of Columbia's statutory procedure for the involuntary confinement of acquittees lacks important procedural protections. In a long line of decisions beginning with *Baxstrom v. Herold* in 1966 and continuing through *Vitek v. Jones* in 1980, this Court has held that those protections cannot be denied to other individuals facing involuntary commitment to mental institutions. Affirmance of the decision below would require a substantial departure both from the holdings of those cases and from their logic. Reversal of that decision, on the other hand, would safeguard important personal liberty interests, while recognizing the Government's legitimate interest in treating persons who are mentally ill and protecting society from the truly dangerous.

Accordingly, *amici* respectfully urge the Court to reverse the judgment below.

Respectfully submitted,

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No. 81-5195

IN THE

Supreme Court of the United States

October Term, 1981

MICHAEL JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF OF AMICUS CURIAE, DEPARTMENT OF THE PUBLIC ADVOCATE, DIVISION OF MENTAL HEALTH ADVOCACY, STATE OF NEW JERSEY

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NO. 80-5195

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

MICHAEL JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF OF AMICUS CURIAE, DEPARTMENT OF THE PUBLIC ADVOCATE, DIVISION OF MENTAL HEALTH ADVOCACY, STATE OF NEW JERSEY

INTEREST OF AMICUS CURIAE

This case presents questions concerning the procedural rights of individuals found not guilty by reason of insanity. Amicus curiae, the Division of Mental Health Advocacy of the New Jersey Department of the Public Advocate,[1]

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[1] The Division of Mental Health Advocacy, a State agency within the New Jersey Department of the Public Advocate, created by the New Jersey legislature in 1974, has two primary statutory functions: It "may provide . . . legal representation . . . for any indigent mental hospital admittee's admission to, retention in, or release from confinement in . . . [a mental hospital or a similar facility]," N.J.S.A. 52:27E-24, and it "may represent the interests of indigent mental hospital admittees in such disputes and litigation, as will . . . best advance [their] interests as a class on an issue of general application to them," N.J.S.A. 52:27E-25.

represents such individuals in nine of the state's 21 counties.[2] The Division has handled litigation in which various aspects of the issues present in the instant case have been addressed by the New Jersey courts.[3] In these cases, the Division has generally taken positions consistent with those advocated by petitioner in the instant matter. Because of its involvement and concern in these matters, the Division desires to inform the parties and this Court about New Jersey's experience with its system for assuring the rights of acquittees.

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[2]Division statistics indicate that Division attorneys have represented 54 acquittees at release hearings in the last six months.

[3]The Division of Mental Health Advocacy has also submitted, or moved for leave to file, briefs as amicus curiae in three other cases before this Court involving mental health issues within the experience and expertise of the Division and relevant to its work in New Jersey. Kremens v. Bartley, 431 U.S. 119 (1977),

Additionally, this case may resolve an apparent conflict between New Jersey Appellate Division decisions (In re Scelfo, 170 N.J. Super. 394, 406 A. 2d 973 (App. Div. 1979) and Matter of Newsome, 176 N.J. Super. 511 424 A. 2d 222 (App. Div. 1980)), and a recent revision of the New Jersey statutory scheme relative to acquittees (N.J.S.A. 2C:4-8), as to the burden of proof appropriately borne by the state in proceedings determining the committability of such acquittees.

Because of its statutory role and experience in these matters and because its concern about the possible effect of this case on New Jersey law in this area, the Division has sought leave from the parties to file its brief amicus curiae. Both parties to this case have consented and their consents are being filed herewith.

Parham v. J.R., 442 U.S. 584 (1979), and Mills v. Rogers, cert. grant. -- U.S. -- 101 S. Ct. 1972 (1981), motion to file brief amicus curiae out of time den, 50 U.S.L.W. 3546 (1982).

SUMMARY OF ARGUMENT

Amicus wishes to share with this Court and the parties a description of the development of New Jersey law relative to the procedures of incarceration and release of persons found not guilty by reason of insanity of criminal offenses, particularly as that development has been affected by opinions of the United States Supreme Court. Amicus, against the background of the New Jersey experience, asserts that due process requires that, except for an initial observation and examination period, an acquittee may not be committed or restricted except upon a finding of continuing mental illness and dangerousness. Further, amicus maintains equal protection requires that an acquittee should receive the same procedural protection afforded committees. As to burden of proof, it is

amicus' position that the prosecuting authority should bear the burden of proving the committability of the acquittee and that no "presumption of continuing insanity" should be used to shift this burden to the acquittee. Finally, the burden borne by the prosecuting authority should be one requiring proof by evidence that is at least clear and convincing.

ARGUMENT

I. DUE PROCESS REQUIRES THAT AN INDIVIDUAL FOUND NOT GUILTY BY REASON OF INSANITY NOT BE CONFINED TO A MENTAL HOSPITAL INDEFINITELY ON THE BASIS OF THAT FINDING ALONE.

A. New Jersey Has Evolved An Efficient And Constitutionally Adequate System For Disposition Of Cases Wherein There Has Been An Acquittal Of A Criminal Charge By Reason Of Insanity.

The present system of confinement and release of persons found not guilty by reason of insanity in New Jersey is found in

the New Jersey statutes[4] and Rules of Court.[5]

If a defendant is acquitted of a criminal offense by reason of insanity,[6]

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[4] N.J.S.A. 2C:4-8 and 2C:4-9 specifically deal with the disposition of persons found not guilty by reason of insanity. They are set forth in Appendix A, infra.

[5] N.J. Ct. R. 3:19-2, as effective September 1, 1979, reads as follows:

> If a defendant interposes the defense of insanity and the defendant is acquitted after trial on that ground, the verdict and judgment shall so state. Upon the return of a verdict of "Not Guilty By Reason on Insanity" or entering of judgment to that effect by a court sitting without a jury, the procedure for disposition of the defendant shall be as provided by N.J.S.A. 2C:4-8 and 2C:4-9 and R. 4:74-7.

R. 4:74-7 is the court rule concerning civil commitments. Relevant portions of the rule are set forth in Appendix B, infra.

[6] According to N.J.S.A. 2C:4-1:

> A person is not criminally responsible for conduct if at the time such conduct he was laboring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong. Insanity is an affirmative defense which must be proved by a preponderance of the evidence.

the court will order the defendant to undergo a psychiatric examination to aid in the determination of the appropriateness of confinement or restriction of the acquittee. If this examination is conducted while the acquittee remains institutionalized, it must, pursuant to the case of State v. Krol, 68 N.J. 236, 256, 344 A. 2d 289, 300 (1975) be completed within 60 days.[7] The acquittee may, pursuant to N.J.S.A. 2C:4-8a,[8] also be examined by a psychiatrist of his own choice.

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[7]In providing for the 60 day period of observation and examination, Krol noted:

> Proof by defendant that his criminal conduct was the result of mental illness provides sufficient justification for holding him in custody for a reasonable period of time to determine if he in fact should be indefinitely committed.

Id. See Benham v. Edwards, 501 F. Supp. 1050, 1059 (N.D. Ga. 1980), noting that a consensus of jurisdictions have accepted automatic observation periods but that two have rejected them (Indiana, Wisconsin).

[8]Text of statute in Appendix A.

A hearing is then conducted at which the state bears the burden of showing that the acquittee is mentally ill and poses a danger such that hospitalization or other suitable restraints are appropriate. The burden placed upon the state at this hearing is, by N.J.S.A. 2C:4-8b(3), one of preponderance.[9] The court shall thereupon enter an order providing for the appropriate level of restraint.

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9 See App. A for text of statute. It must be noted that this was also the burden established by the court in Krol, 68 N.J. at 257, 344 A. 2d at 300. However, both panels of the New Jersey Appellate Division which have considered the question have concluded, subsequent to this court's decision in Addington v. Texas, 441 U.S. 418 (1979), that a "clear and convincing" burden was constitutionally requisite for involuntary institutionalization of acquittees. Scelfo, 170 N.J. Super, at 397, 406 A. 2d at 975; Newsome, 176 N.J. Super. at 517, 424 A. 2d at 225. However, neither Scelfo nor Newsome dealt with hearings determining the initial appropriateness of commitment (N.J.S.A. 2C:4-8, infra App. A) outlined judically by Krol. Rather, these two decisions dealt with hearings held periodically for the review and alteration of the initial commitment (outlined principally by State v. Fields, 77 N.J. 282, 390 A. 2d 574 (1978); and see N.J. Ct. R. 4:74-7(f), App. B.) The degree of potential conflict will be discussed infra.

The periodicity of court review -- absent motion by a party -- is thereafter identical to that received by a civil committee as specified by N.J. Ct. R. 4:74-7.[10] This rule requires review "at intervals of three months, nine months and twenty-one months from the date of the judgment of commitment and at least annually thereafter, if necessary." Fields, 77 N.J. at 312, n. 11, 390 A. 2d at 589.

At each such periodic review the state continues to bear the burden of proof. Fields, 77 N.J. at 295, 390 A. 2d at 580. However, as indicated at n. 9, supra, the level of the burden to be met is open to some doubt at this time. N.J.S.A. 2C:4-8b(3),

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10 N.J.Ct. R. 3:19-2, n. 5 supra, contains specific reference to N. J. Ct. R. 4:74-7. Amendment of the rule in 1979 to include this reference was by way of conforming practice concerning acquittee review procedures to directives of the State Supreme Court in Fields. See Pressler, Current N.J. Court Rules, Comment to R. 3:19-2 (1972), at 438.

effective December 23, 1981, states that "during the maximum period of imprisonment that could have been imposed," had the acquittee been found guilty,[11] the continued commitment of the acquittee "shall be established by a preponderance of the evidence." This is consistent with the holdings of Krol, 68 N.J. at 257, 344 A. 2d at 300, and Fields, 77 N.J. at 299-300, 390 A. 2d at 583.[12]

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[11] See text of statute, App. A., explaining factors for calculation of "maximum period of imprisonment."

[12] In both cases the State Supreme Court noted there were other jurisdictions employing more stringent standards. Krol, 68 N.J. at 257, n. 9, 344 A. 2d at 299; Fields, 77 N.J. at 299, n. 6., 390 A. 2d at 586. In the latter footnote, the court commented:

> We note that the United States Supreme Court has recently agreed to review this issue in the civil commitment context. State v. Addington . . . Until the court speaks as to the requirements of the federal constitution in this regard, we perceive no constitutional infirmity in continuing to employ the preponderance standard in New Jersey.

However, this would appear to be in conflict with two holdings of the Appellate Division, n. 9 supra, which construed Addington in the context of the logic developed in Krol and Fields. These courts concluded that patients previously found not guilty by reason of insanity could only be continued in confinement at review hearings if the state met a burden of showing the necessity for continued confinement by clear and convincing evidence. Moreover, the Scelfo court determined that its holding was retroactive. 170 N.J. at 397, 406 A 2d at 975.

In addition to those hearings regularly scheduled for review of commitment, an acquittee may in the interim request judicial review of the current validity of the restrictions on his liberty. Fields, 77 N.J. at 304, 390 A. 2d at 584. The court need not grant the request absent "a prima facie showing that a material change in circumstances has

occurred since the last periodic review hearing." Id. However, unlike the situation at a regularly scheduled periodic review, in an acquittee-initiated review the acquittee himself bears the burden, by a preponderance of the evidence, that his request for modification or termination of restraints be granted.[13]

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[13]This conforms to habeas corpus practice in the District of Columbia. Respondent's brief at 5, n. 4. The Fields court supplemented its reasoning by remarking.

> We do not interpret the principles of due process to require the State to bear the burden of proof at every proceeding where the validity of the prevailing restraings upon the liberty of the committee is considered. As we have noted . . . the order entered after each periodic review validates the restraints imposed therein until the next such hearing. Hence, a committee-initiated review proceeding seeks modification of restraints whose current validity is presumptively established as a result of the adjudication at the most recent periodic review. We perceive no constitutional obstacle to requiring the party who seeks change in the presumptively valid status quo to bear the burden of demonstrating the necessity for such a change.

77 N.J. at 304, n. 9, 390 A. 2d at 585. It is

Additionally, N.J.S.A. 2C:4-9 provides that if "the commissioner [of Human Services], or his designee, or the Superintendent of the institution" to which a person has been committed pursuant to N.J.S.A. 2C:4-8, is "of the view"that this person may be discharged or released with conditions, he may so apply to the Court. The court may obtain additional psychiatric reports, if it desires, and may follow the recommendations it receives without a hearing, or, if not satisfied, order a hearing which

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appropriate to note here that in the District of Columbia, acquittees also bear the burden of proof at hearings they initiate. Respondents' brief at 3, n. 1. However, the difference between New Jersey and the District is that, unlike New Jersey, in the District there are no regularly scheduled reviews at which the prosecuting authority bears the burden. The District of Columbia panel did, however, mandate that the Superintendent of St. Elizabeth's or his subordinates should examine the patient every six months to determine potential eligibility for release. Jones v. U.S. A. 2d 183, 190 (App. D.C. 1978).

shall be conducted in the manner outlined in N.J.S.A. 2C:4-8. No statement is made in the statute as to who might bear the burden at such a hearing and, as of yet, there is no case law on the question.[14]

B. Considerations Of Equal Protection And Due Process Require That, After A Permissible Observation Period, An Acquittee Not Have His Liberty Restricted Absent A Judicial Finding Of Continuing Dangerousness As A Result Of Mental Illness.

The New Jersey Supreme Court has enunciated a clear doctrine of the substantial identity of acquittees and committees in terms of committability:

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14 Apparently there is similar confusion as to the placement of the burden in the District of Columbia's analogous statute. Respondent's brief at 3, n. 1. An ingenious solution to this problem has been devised in Colorado where the burden is borne by the party contesting the recommendation of the chief officer of the custodial institution. People v. Chavez, 629 P. 2d 1040 (Colo. Sup. Ct. 1981).

> A defendant who has avoided criminal sanction by establishing his insanity at the time he committed the offense for which he was tried stands on essentially the same legal footing, in terms of his amenability to involuntary commitment, as any other member of society . . . . Prospective NGI [not guilty by reason of insanity] committees and prospective civil committees are constitutionally indistinguishable in terms of their entitlement to procedural and substantive due process rights.[15]

Fields, 77 N.J. at 297, 390 A. 2d at 581.

It is clear that the court was making an effort to conform its logic to that previously developed by the Supreme Court of the United States. In Krol, after analyzing Baxstrom v. Herold, 383 U.S. 107 (1966) and Jackson v. Indiana, 406 U.S. 715 (1972), the New Jersey Supreme Court concluded:

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15 By way of footnote to the first sentence the Court noted the justifiable exception of an "automatic temporary commitment following an insanity acquittal for purpose of psychiatric evaluation of the acquittee's present mental condition." See analysis, at n. 9 supra.

> [T]he Supreme Court in these opinions has plainly attempted to enunciate a broad principle -- that the fact that the person to be committed has previously engaged in criminal acts is not a constitutionally accepted basis for imposing upon him a substantially different standard of procedure for involuntary commitment. The labels "criminal commitment" and "civil commitment" are of no constitutional significance.

68 N.J. at 251, 344 A. 2d at 297.

It must be immediately stated that in no way has the New Jersey Supreme Court suggested that the fact that the acquittee has committed a crime is to be ignored. Far to the contrary, the court has stated:

> It is appropriate for the [trial] court to give substantial weight to the nature and seriousness of the crime committed by defendant and its relationship to his present mental condition.

Krol, 68 N.J. at 261, 344 A. 2d at 302. Nor is the fact to be ignored at periodic reviews; the acquittee's "propensity, by reason of his mental illness, to engage in serious antisocial

conduct has on at least one occasion crystallized into the commission of what otherwise would constitute a criminal offense." Fields, 77 N.J. at 308, 390 A. 2d at 587.

The relevance of the prior anti-social conduct to present mental illness and dangerousness remains a question of fact:

> Empirical studies suggest that prior criminal conduct is an important factor -- perhaps the most important -- in the prediction of future dangerous conduct. (Citations omitted.)

Krol, 68 N.J. at 261, 344 A. 2d at 302.[16]

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16 For a recent analysis of the literature in support of this proposition, see Cocozza, Melick and Steadman, "Trends in Violent Crime Among Ex-Mental Patients," 16 Criminol. 317, 330 (1978). See also

Nevertheless, the Krol court made the following observations which certainly must inspire caution in any reliance that is placed upon the prior anti-social conduct:

> Even persons suffering from mental illness who have committed prior criminal acts have not been shown to be consistently substantially more dangerous than other persons suffering from mental illness . . . (Citations omitted.)

Krol, 68 N.J. at 247, 344 A. 2d at 295. A long term study of criminally insane patients

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Rabkin, "Criminal Behavior of Discharged Mental Patients: A Critical Appraisal of the Research," 86 Psychol. Bull. 1, 21 (1979), noting that "the best predictor of subsequent arrest for violent crime was arrest for one or more violent crimes preceding hospitalization." This is, of course, to be kept in the perspective that, "arrests for criminal acts are comparatively rare events . . . " Id. at 2. This latter point is prevalent in the literature. Steadman and Morrissey, "The Statistical Prediction Of Violent Behavior: Measuring the Costs of a Public Protectionist Versus A Civil Libertarian Model," Law & Human Behavior (in press) ("Clearly the most parsimonious manner to reduce the number of errors of either clinical or statistical predictions of dangerousness is to predict no one will be dangerous.") (manuscript, at 13).

released as a result of a federal court decision in Pennsylvania [Dixon v. Attorney General of the Commonwealth of Pennsylvania, 325 F.Supp. 966 (M.D. Pa. 1971)] concluded:

> In any population of the criminally insane, the proportion who would repetitively commit serious violent acts is quite small and the overall policy concerning the treatment of the criminally insane should not be based on the behavior of this small subgroup.

Thornberry and Jacoby, The Criminally Insane: A Community Follow-up of Mentally Ill Offenders 210 (1980) (emphasis added).

The Krol court summarized its reasoning, as applied in this regard to the first post-commitment hearing, by stating;

> The fact that defendant is presently suffering from some degree of mental illness and that at some point in the past mental illness caused him to commit a criminal act, while certainly sufficient to give probable cause to inquire into whether he is dangerous, does not, in and of itself, warrant the inference that he presently poses a significant threat of

> harm, either to himself or to others.

68 N.J. at 247, 344 A. 2d at 295.[17]

Having developed its reasoning as to the substantial identity of acquittees and committees, the court felt, when faced with the issue, that this must extend to the availability of automatic periodic judicial review. Such reviews were mandated by the court, "in response to O'Connor v. Donaldson [433 U.S. 563 (1975)]," by means of a civil practice

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[17] The "probable cause" for inquiry to which the court referred must not be mistaken for any kind of presumption of continuing insanity, an argument "whose soundness is doubtful at best . . . The decisive consideration where personal liberty is involved in that each individual's fate must be adjudged on the facts of his own case, not on the general characteristics of a 'class' to which he may be assigned." Id. at 255, 344 A. 2d at 299.

rule.[18] Fields, 77 N.J. at 297, 390 A. 2d at 581. In requiring that the same procedures be made available to acquittees, the court stated simply:

> In light of the constitutional imperative of substantially equal treatment reflected in Baxstrom and Jackson, we discern no constitutionally satisfactory justification for denying comparable protection to NGI committees.

Id.[19]

It must be emphasized that the court has endeavored to advise the trial judges of New Jersey that "[t]he final decision on the need for an appropriate extent of restrictions on the committee's liberty is for the court, not the psychiatrists" (emphasis in original). Fields, 77 N.J. at 308, 390 A. 2d at 587.[20]

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[18] N.J. Ct. R. 4:74-7(f); see App. B. inf a.

[19] Accordingly, the court referred the matter to its Criminal Practice Committee which revised N.J. Ct. R. 3:19-2 to its present form, see n. 5 supra. See also, n. 10 supra, and App. B.

[20] The loyalties of state-employed psychiatrists may, in any case, be somewhat divided. Polk County v. Dodson, -- U.S. -- 102 S. Ct. 445, 450-451 (1981).

In indicating the caution that should be taken in these cases, the court remarked:

> [E]ven where the committee's condition shows marked improvement, only the most extraordinary case would justify modification in any manner other than by a gradual de-escalation of the restraints upon the committee's liberty. For example, where the state is unable to justify the continuance of an order for restrictive confinement, the outright release of the committee into the community without the use of any intermediate levels of restraint . . . would normally constitute a manifestly mistaken exercise of the reviewing court's discretion.

Id. at 303, 390 A. 2d at 584.

On the basis of the foregoing, it can therefore be concluded that the New Jersey system of treating acquittees operates both efficiently and consistently in accordance with federal case law and current scientific thinking about the nature of this population.

II. CONSIDERATIONS OF EQUAL PROTECTION REQUIRE THAT A DEFENDANT FOUND NOT GUILTY BY REASON OF INSANITY SHOULD RECEIVE THE SAME PROCEDURAL PROTECTIONS AFFORDED CIVIL COMMITTEES.[21]

A. The Burden Of Proof For Establishing Continuing Dangerousness And Mental Illness Of An Acquittee Should Lie With The Prosecuting Authority.

In 1974, in the case of State v. Carter, 64 N.J. 382, 316 A. 2d 449 (1974), the New Jersey Supreme Court declared that an acquittee, at a hearing seeking discharge, bore the burden of proving his eligibility for conditional

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[21] Of the three differences between the statutory schemes of the District of Columbia for acquittees and committees -- jury trial, placement of proof burden and requisite quanta of proof -- amicus will only comment on the latter two. The jury trial issue could not arise in New Jersey, at least in any similar context, because "[c]ivil commitments under N.J.S.A. 30:4-23 et seq. are nonjury proceedings." Krol, 68 N.J. supra, at 264, n. 14, 344 A. 2d at 304.

release.[22] Only a year later, in the Krol case, the court reversed itself on this issue and declared that the state must establish the acquittee's committability by a preponderance of the evidence. Krol, 68 N.J. at 257, 344 A. 2d at 300. In Fields, the rationale was easily extended to periodic reviews, the court citing the "eloquently stated" reasoning of the Supreme Court of Connecticut.

> The burden should not be placed on the committed patient to justify his right to liberty. Freedom from involuntary confinement for those who have committed no crime is the natural state of individuals in this country. The burden must be placed on the state to prove the necessity of stripping the citizen of one of his most fundamental rights, and the risk of error

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[22] At the time, New Jersey law was to the effect that an acquittee must show his lack of dangerousness by clear and convincing evidence, thus justifying his release with conditions, but had to show his "restoration to reason" by only a preponderance in order to justify his final release. See discussion of this history in Krol, 68 N.J. at 263, n. 13, 344 A. 2d at 303-4.

> must rest on the state. Since the state has no greater right to confine a patient after the validity of the original commitment has expired than it does to commit him in the first place, the state must bear the burden of proving the necessity of recommitment, just as it bears the burden of proving the necessity for commitment. (Fasulo v. Arafeh, 173 Conn. 473, 378 A. 2d 553, 557 [1977]).

77 N.J. at 300, 390 A. 2d at 574.

The Connecticut court based its conclusions in part on a realistic consideration of the patient's environment:

> [T]o require a patient to initiate judicial review of his confinement and to bear the burden of proving the non-existence of the necessity for that confinement ignores the practical considerations . . . which are inherent in the mental patient's situation. Briefly, these include the difficulties of overcoming an isolated environment to initiate and coordinate a challenge to one's confinement. For instance, we cannot assume that friends and allies will always be available to secure counsel and marshal evidence on the patient's behalf.

Fasulo, 173 Conn. at 481, 378 A. 2d at 557. Additionally the Connecticut court noted that "practical difficulties" for the patient may include "his possible incompetence and the debilitating effects of drugs or other treatment." Id, at 482, 378 A. 2d at 557.

Obviously these considerations all add weight to the observation of the D.C. Circuit Court of Appeals in Waite v. Jacobs, 475 F. 2d 392, 395 (Ct. App. 1973):

> [E]specially in cases concerning psychiatric testimony which is "often unclear, sometimes woefully muddled," United States v. Leazer [citation omitted], the allocation of the burden of proof can be outcome determinative.

On the basis of this reasoning, amicus therefore submits that the burden of proof for continued restriction of acquittees should

lie with the prosecuting authority.[23]

B. Distinctions In The Procedural Guarantees Afforded Acquittees And Committees Cannot Be Justified On The Basis Of Any Scientifically Or Legally Supportable "Presumption Of Continuing Insanity."

Central to the argument that the acquittee should bear the burden in establishing his own lack of committability is a notion that, by successful assertion of an insanity defense, he has raised a "presumption of continuing insanity."

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23 An aspect of the case law from the District of Columbia which has received no recognition in New Jersey is the notion that an acquittee may bear "meaningful elements of responsibility." United States v. Brown, 478 F. 2d 606, 611 (D.C. Cir. 1973); Waite, 475 F. 2d at 396. It appears that the District's statutory scheme may have been developed in part as a result of the widened scope of the insanity defense resulting from case law in the district. Bolton v. Harris, 395 F. 2d, 642, 648-649 (D.C. Cir. 1968). It is submitted that any decision hinged on this idea could have no significance to a jurisdiction like New Jersey which retains a modified M'Naghten standard (n. 6 supra) and where the State Supreme Court has stated:

> In order to explain the basis of the presumption, courts have had trouble doing more than merely reiterating it, commenting on its "self-evident legitimacy."

Benham, 501 F. Supp. at 1068. This statement appears to be true of the instant case. In the en banc decision, the court stated that "it is reasonable to presume the continuation of mental illness . . . ," 432 A. 2d at 374, and:

> Commitment following acquittal by reason of insanity is not intended to be punitive, for, although such a verdict implies a finding that defendant has committed the actus reus, it also constitutes a finding that he did so without a criminal state of mind. There is, in effect, no crime to punish. (Citations omitted.)

Krol, at 246, 344 A. 2d at 295. Or, as a federal court in Georgia has recently pointed out:

> To punish an insanity-acquittee, or to utilize a procedure which includes a punitive component, runs counter to the overwhelming authority that an insanity-acquittee is not responsible, and not properly subject to punishment.

Benham, 501 F. Supp. at 1065, citing numerous authorities.

> As mentioned above, the presumption that a mental condition continues is a reasonable one and it is also reasonable to require the person who raised the presumption to refute it by affirmative proof.

Id. This view seems, in the District of Columbia, to go back to Waite, 475 F. 2d at 399-400, where it was stated, without supporting citation:

> The rational justification for placing the burden of proof on a committee is that his mental illness and dangerousness have previously been convincingly established. In light of these established facts, the law gives effect to a presumption of continunity of status. It comports with normal perception of reality -- and hence is rational -- to assume that, once a given status is proven to exist, it continues to do so in the absence of evidence showing the contrary to be more likely than not.[24]

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[24] Creation of a "presumption" application to the criminally insane but not the civilly insane certainly contradicts the general principle enunciated in Baxstrom:

> Classification of mentally ill persons as either insane or

In criticizing such a view, Judge Murphy in Benham noted that the Supreme Court has required that:

> [F]or a statutory presumption to pass constitutional muster, it must be shown with "substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Leary v. United States, 395 U.S. 6, 36, 89 S. Ct. 1532, 1548, 23 L. Ed. 2d 57 (1965) (emphasis supplied). Even if the presumption were "rational" -- which it is not -- it would not satisy this requirement of due process.

Benham, 501 F. Supp. at 1068, n. 24.[25]

> dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill at all.

Id. 383 U.S., supra, at 111 (emphasis in original).

[25]Essential adjudicatory facts may not be merely taken as presumed. Stanley v. Illinois, 405 U.S. 645, 657-8 (1972).

Judge Murphy then proceeded to show that "the literature emanating from the medical profession indicates that the presumption is not based on valid scientific evidence." Id.

In fact, it would appear that if any presumption were to accord with scientific evidence, it would be one expressing the opposite conclusion: that any given individual who has exhibited criminal dangerousness as a result of mental illness in the past will, more likely than not, exhibit no such dangerousness in the future. See citations in Benham, 501 F. Supp. at 1068.[26]

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[26] For more recent studies, see Thornberry and Jacoby, text at n.16, supra; Quinsey, "Release from a Maximum Security Psychiatric Institution: Demographic and Clinical Variables," 6 Crim. Just. & Behav. 390 (1979); Rabkin, n. 16, supra.

Furthermore, he may very well recover and cease to present any evident psychiatric symptomatology. Even schizophrenics, who as a class have a relatively poor prognosis, may be successfully treated if the condition is treated in one of its less serious stages. Arieti, Interpretation of Schizophrenia 646-7 (1974).

The Supreme Court has already recognized "the lack of certainty and the fallibility of psychiatric diagnosis," Addington, 441 U.S., at 429.

> Psychiatric diagnosis . . . is to a large extent based on medical "impressions" drawn from subjective analysis and filtered through the experience of the diagnostician. This process often makes it very difficult for the expert physician to offer definite conclusions about any particular patient.

Id. at 430. Moreover, social and political pressure has been shown to affect psychiatric predictions. A Task Force Report of the

American Psychiatric Associated noted that "[p]sychiatrists, in order to be safe, too often predict dangerousness, especially in the case of mentally ill offenders." American Psychiatric Assocation, Clinical Aspects of the Violent Individual 25 (1974). See Thornberry and Jacoby, supra, at 192, finding that patients released from a hospital for the criminally insane pursuant to court order had considerably lower re-arrest rates than predicted by the hospital staff.[27]

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27 The study concluded:

> The Dixon patients were confined for an average of 14.1 years and, in New York State, the Baxstrom patients had been confined for an average of 14.7 years before they were transferred by court decisions . . . In both cases the empirical evidence suggests that confinement for this length of time is excessive and is not required for the benefit of either the patients or the community.

Inevitably, it is only appropriate to consider each individual separately.

> The decisive consideration where personal liberty is involved is that each individual's fate must be adjudged on the facts of his own case, not on the general characteristics of a "class" to which he may be assigned.

Krol, 68 N.J. at 255, 344 A. 2d at 299. This is all the more true if, as appears to be the case, there is no class, from a scientific perspective, to begin with.[28]

Id. at 208. See also authorities cited at n. 16 supra, and Quinsey and Ambtman, "Variables Affecting Psychiatrists and Teachers' Assessments of the Dangerousness of Mentally Ill Offenders," 47 J. Consult. & Clin. Psychol. 353 (1979), concluding that forensic psychiatrists tended to make their assessments of patient dangerousness primarily on the basis of offense type. For a more recent analysis see Steadman, "The Right Not To Be A False Positive: Problems in the Application of the Dangerousness Standard," 52 Psych. Q. 84, 96 (1980): ("Nowhere in the research literature is there any documentation that clinicians can predict dangerous behavior beyond the level of chance.")

28 Some recent studies have suggested that certain factors may be more predictive of future dangerousness among psychiatric populations than others. One study found correlations of this sort connected with (1) the nature of

As Judge Murphy correctly observed in Benham, 501 F. Supp., at 1069, no presumption can arise as to acquittees because of the criminal behavior which

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the original offense (murder), (2) level of education and (3) diagnosis (retardation more likely connected with subsequent dangerousness). Quinsey, n. 26, supra. Another study concluded that:

> [P]atients with diagnosis of personality disorders, alcoholism, and drug dependency have disproportionate arrest rates. Whether this is caused by the nature of their disorders or by demographic characteristics associated with their distribution in the general population remains unclear.

Rabkin, 86 Psychol. Bull. at 23. See also, Grumberg, Klinger, and Grumet, "Homicide and Community-Based Psychiatry," 166 J. Nerv. and Ment. Disease 868, 873 (1978), noting especially:

> If mental illness is compared with the consumption of alcohol as a factor in the commission of homicide, we find that the use of alcohol is much more significant. Yet restrictions on the sale and consumption of alcohol are not considered popular ways to reduce crimes of violence.

initiated the legal processes against them. Many committees have in fact been committed rather than prosecuted because of police or prosecutorial discretion in disposition of cases.[29]

Judge Murphy was correct in concluding:

> In the light of the absence of any relevant difference between M.H.C. committees and insanity-acquittees, the tautological justification for the presumption in the latter's hearing lacks rational support.

It must also be considered that individuals violating the same social norms may be treated differently in different states depending on how much de-institutionalization and funding cut-backs have effected the closing of mental hospitals. See, Cocozza et al., supra, n. 17, and Monahan and Steadman, Crime and Mental Disorder: An Epidemiological Approach," Crime and Justice: An Annual Review of Research (Morris and Tonry, eds., in press).

[29]See Rabkin, 86 Psychol. Bull. at 6-7, for a literature summary. One study found that 71 of 100 randomly selected committees had engaged in illegal acts, including 23 likely felonies, none of which were prosecuted; also see Levine, "Criminal Behavior and Mental

Id. Therefore, amicus would urge this Court to decide this case without relying on a "scientifically unsupported" presumption of continuing insanity.

C. The Prosecuting Authority Should Bear The Burden Of Proving The Committability Of An Acquittee By Clear And Convincing Evidence.

Amicus supports petitioner's contention that committability of an acquittee should be proven by clear and convincing evidence. As indicated above, two New Jersey appellate decisions have acknowledged the Addington logic as applicable to acquittees. Perhaps the logic for such an application of Addington

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Institutionalization," J. Clin. Psychol. 1134 (1977).

Concommitantly, there is now evidence that a significant number of minor crimes may be committed by individuals as a way of asking for help. Lamb and Grant, "The Mentally Ill In An Urban County Jail," 39 Arch. Gen. Psych. 17, 19 (1982).

was best developed in Judge Wright's dissent in the pre-Addington case of United States v. Brown, 478 F. 2d 606, 613-614 (D.C. Cir. 1973), where he observed:

> Bolton and Baxstrom stand for a basic proposition that a proven history of past dangerousness or illness, while certainly admissable in evidence, may not be used as an excuse to abrogate or change well recognized safeguards including burden of proof, in civil commitment proceedings, or their equivalent, to determine present dangerousness or illness . . . . [A]cquittal by reason of insanity says precious little on the question whether a person presently suffers from mental illness. At most, an insanity acquittal means that at the time the charged crime was committed, which ordinarily would be months or sometimes years before the Section 301(d) hearing, there was a reasonable doubt that the defendant was free of such an illness. Such a reasonable doubt as to sanity is hardly tantamount to a conclusion of mental illness, there may well be only the flimsiest relation between the Government's failure to prove past capacity and current incapacity [footnote omitted]. Thus, it can hardly be argued that the prior acquittal, standing

> alone, has any necessary bearing as a factual matter on the mental illness finding to be made in the Section 301(d) hearing.

Amicus contends that no distinction between acquittees and committees can appropriately be made by the procedural mechanisms being considered here, but that rather the distinction can be more effectively made by substantive consideration of the evidence of the acquittees prior conduct. See Point II. B., supra. Therefore, amicus believes the Court should extend the clear and convincing standard as to the commitment of acquittees.

CONCLUSION

For the reasons stated above, amicus urges the Court to reverse the

judgment of the Court of Appeals of the District of Columbia.

Respectfully submitted,

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APPENDIX A

N.J.S.A. 2C:4-8. Commitment of a person by Reason of Insanity.

a. After acquittal by reason of insanity, the court shall order that the defendant undergo a psychiatric examination by a psychiatrist of the prosecutor's choice. If the examination cannot take place because of the unwillingness of the defendant to participate, the court shall proceed as in Section 2C:4-5c [allowing the court "to permit examination without cooperation . . . appoint a different psychiatrist or . . . commit the defendant for observation for a period not exceeding 30 days except on good cause shown, or exclude or limit testimony by the defense psychiatrst"]. The defendant, pursuant to this section, may also be examined by a psychiatrist of his own choice.

b. The court shall dispose of the defendant in the following manner: (1) If the court finds that the defendant may be released without danger to the communtiy or himself without supervision, the court shall so release the defendant; or (2) If the court finds that the defendant may be release without danger to the community or himself under conditions, the court shall so order; (3) If the court finds that the defendant cannot be released with or without supervision or conditions without posing a danger to the community or to himself, it shall commit the defendant to a mental health facility approved for this purpose by the Commissioner of Human Services to be treated as a person civilly committed. In all

proceedings conducted pursuant to this section, including any periodic review proceeding, the prosecuting attorney shall have the right to appear and be heard. The defendant's continued commitment, under the law governing civil commitment, shall be established by a preponderance of the evidence, during the maximum period of imprisonment that could have been imposed, as an ordinary term of imprisonment, for any charge on which the defendant has been acquitted by reason of insanity. Expiration of that maximum period of imprisonment shall be calculated by crediting the defendant with any time spent in confinement for the charge or charges on which the defendant has been acquitted by reason of insanity.

c. No person committed under this section shall be confined within any penal or correctional institution or any part thereof.

2C:4-9 Release of Persons Committed by Reason of Insanity

a. If a person has been committed pursuant to this chapter and if the commissioner, or his designee, or the superindentent of the institution to which the person has been committed, is of the view that a person committed to his custody, pursuant to Section 2C:4-8, may be discharged or released on condition without danger to himself or to others, or that he may be transfered to a less restrictive setting for treatment, the commissioner or superintendent shall make application for the discharge or release of such person in a report to the court by which such

person was committed and shall transmit a copy of such application and report to the prosecutor, the court, and defense counsel. The court may, in its discretion, appoint at least two qualified psychiatrists, neither of whom may be on the staff of the hospital to which the defendant had been committed, to examine such person and to report within 30 days, or such longer period as the court determines for the purpose, their opinion as to his mental condition.

b. If the court is satisfied by the report filed pursuant to subsection a. of this section and such testimony of the reporting psychiatrists as the court deems necessary that the committed person may be discharged, released on condition without danger to himself or others, or treated as in civil commit-

ment the court shall order his discharge, his release on such conditions as the court determines to be necessary or his transfer. If the court is not so satisfied, it shall promptly order a hearing to determine whether such person may safely be discharged, released or transferred. Any such hearing shall be deemed a civil proceeding. According to the determination of the court upon the hearing, the court shall proceed as in section 2C:4-8b (1) (2) or (3).

c. A committed person may make application for his discharge or release to the court by which he was committed, and the procedure to be followed upon such application shall be the same as that prescribed above in the case of an application by the commissioner.

d. Each defendant's case shall be specifically reviewed as provided by the law governing civil commitment.

APPENDIX B

R. 4:74-7 Civil Commitment[1]

...

(d) Discovery . . .

The court may order testing or examination of the patient by an independent psychiatrist, psychologist or educational expert. The cost of any such examination and the expert's fee for testifying, if any, shall be

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1 R:4-74-7 governs court practice as to civil commitments in New Jersey. Necessarily, much of the procedure is irrelevant as to acquittees -- commencement of a civil action, temporary commitment -- or sufficiently tangential to this argument -- legal settlement, filing procedures -- that it has been thought best to present an abridgment here. Certain aspects of those procedures which are unique to minors have been deleted also.

borne by the person or public body charged with the patient's legal settlement.

(e) Hearing

No permanent commitment order shall be entered except upon hearing conducted in accordance with provisions of these rules. The application for commitment shall be supported by the oral testimony of at least one psychiatrist licensed in any one of the United States who shall have conducted at least one examination of the patient subsequent to the date of the temporary order. The patient shall be required to appear at the hearing, but may be excused from the courtroom during all or any portion of the testimony upon application for good cause shown. Good cause shall include testimony by the psychiatrist that the mental condition of the patient

would be adversely affected by the patient hearing his candid and complete testimony. The patient shall have the right to testify in his own behalf but need not. The hearing shall be held in camera unless good cause to the contrary is shown. The applicant for the commitment may appear either by counsel retained by him or by the county adjuster. In no case shall the patient appear pro se.

(f) Final Judgment Of Commitment, Review. The court shall enter a judgment of commitment to an appropriate institution if it finds the evidence presented at the hearing that the institutionalization of the patient is required by reason of his being a danger to himself or others or property if he is not so confined and treated . . . . If the patient is an adult, the judgment shall provide for review of the commitment no later than (1) three months from the date of judgment, and (2) on or before

six months from the date of the first review hearing, and (3) on or before one year from the date of the second review hearing, and (4) at least annually thereafter, if the patient is not sooner dishcarged . . . . All reviews shall be conducted in the manner required by paragraph (e) of this rule except that if the patient has been diagnosed as suffering from either severe mental retardation or severe irreversible organic brain syndrome, all reviews after the expiration or two years from the date of judgment may be summary, provided all parties in interest are notified of the review date and provided further that the court and all interested parties are furnished with the report of a physical examination of the patient conducted no less than three months

prior thereto. The court may, in its discretion, at a review hearing, where the advanced age of the mental patient or where it would be impractical to obtain the testimony of a psychiatrist (as defined in paragraph (e)), support its findings by the oral testimony of a physician licensed in any one of the United States. A scheduled periodic review, as set forth above, shall not be stayed pending appeal of a prior determination under this rule.

(g) Judgment of Release.

A Judgment discharging the patient may contain in appropriate circumstances conditions for the release such as attendance at a non-residential mental health facility or other form of supervision. Any such conditions shall be stated in the order of discharge with particularity. The continuation of any

such conditions shall be subject to periodic review as provided by paragraph (f) hereof.

Supreme Court, U.S.
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No. 81-5195

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MICHAEL JONES,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF OF AMICUS CURIAE GEORGIA LEGAL SERVICES PROGRAM, INC.

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No. 81-5195

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MICHAEL JONES,
Petitioner,

versus
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF OF AMICUS CURIAE GEORGIA LEGAL SERVICES PROGRAM, INC.

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ATTORNEYS FOR AMICUS CURIAE

INTEREST OF GEORGIA LEGAL SERVICES PROGRAM, INC., AS AMICUS CURIAE*

Georgia Legal Services Program, Inc. (hereinafter GLSP), is a non-profit Georgia corporation engaged in the provision of legal assistance to poor persons in civil cases. GLSP attorneys represent the plaintiff class in Benham v. Edwards, 501 F. Supp. 1050 (N.D. Ga. 1980), appeal docketed, No. 80-9052 (5th Cir., December 17, 1980). Benham was a class action challenge to the procedures governing the commitment and release of insanity-acquitees in Georgia. Certain of the issues raised in this case may have an effect on the Benham litigation, and may, consequently, effect the liberty interests of the class of all present and future insanity-acquitees in Georgia. Because of its ethical obliga-

*Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, consent to the filing of this amicus curiae brief has been given by all parties.

tions to the plaintiff class in Benham, GLSP has filed this brief amicus curiae.*

SUMMARY OF ARGUMENT

This Court, pursuant to its own practice, is obligated to decide constitutional questions on the narrowest possible ground presented. The Court should not reach the question of the validity of Jones' initial commitment under D.C. Code §24-301(d) because no appeal was taken from the initial order. For purposes of this case, it must be assumed that the initial commitment was constitutional.

The hypothetical maximum prison term that would have been imposed on the petitioner is irrelevant because, assuming a valid initial commitment hearing, commit-

*GLSP has been actively involved during the last ten years in representing the mentally disabled and those alleged to be mentally disabled. For example, attorneys from GLSP represented the respondents before this Court in Parham v. J.R., 442 U.S. 613 (1979).

ment must end when the petitioner no longer meets the civil commitment criteria. The issue actually presented by the facts of this case concerns the validity of the procedures governing the petitioner's release from confinement. The review of the judgment below should be limited to the question of whether, as a matter of equal protection, the District of Columbia may impose more stringent release procedures on persons lawfully committed following acquittal by reason of insanity of petty offenses than are imposed on persons committed under the District's Mental Health Code. Since the Court of Appeals failed to properly address this issue, the judgment should be vacated and the case remanded.

If the Court determines that the issue is properly before it, then the Court should hold the release procedures as applied to insanity-acquitees charged with

petty offenses to be lacking a rational basis and therefore in violation of the Equal Protection Clause. Even if rational, the procedures fail to pass the strict scrutiny test. The heightened level of review must be applied because the fundamental right of liberty is at stake.

Should the Court reach the question of the constitutionality of the initial commitment procedures, then it should reject the presumption of mental illness and dangerousness as providing any justification for less stringent procedures for insanity-acquitees. The presumption has no factual or scientific basis, it is inherently inconsistent and it is overbroad.

ARGUMENT

I.

THE COURT SHOULD DECIDE ONLY THE NARROW QUESTION OF THE CONSTITUTIONALITY OF THE DISTRICT OF COLUMBIA PROCEDURES GOVERNING THE RELEASE FROM HOSPITALIZATION OF PERSONS FOUND NOT GUILTY BY REASON OF INSANITY OF PETTY OFFENSES.

This case presents a narrow question: Are the District of Columbia procedures governing the release of insanity acquitees constitutional as applied to persons who were acquitted of petty, nonviolent offenses? While the Court of Appeals went through an elaborate, albeit flawed, analysis of the constitutionality of the procedures governing initial commitment, that analysis was unnecessary to the decision of the case. Jones v. United States, 432 A.2d 364, 373-375 (D.C. App. 1981).[1/] Jones did

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1/ The initial commitment hearing under D.C. Code §24-301(d) was euphemistically referred to as a "50-day release hearing" by the court below. Jones

not directly challenge the initial commitment under D.C. Code §301(d) since he had not appealed from the commitment order entered at that first hearing. Id., at 368. Instead, he argued that once the hypothetical maximum prison sentence had expired, he either had to be released or civilly committed pursuant to D.C. Code §21-545(b). Thus the rationale advanced by the court below in support of the constitutionality of the initial commitment procedures was, at best, obiter dictum and should be treated as such by this Court.[2/] For pur-

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v. United States, at 368. In actuality it is an initial commitment hearing since it is the first proceeding at which a determination is made as to the acquitee's present mental state and present need for hospitalization.

2/ The two principle differences between the commitment of insanity acquitees under D.C. Code §24-301(d) and commitment under the D.C. Mental Health Code, D.C. Code §21-545(b), addressed by the Court of Appeals were: (1) the availability of a jury trial for civil committees that was unavailable to

poses of this case, it can be assumed that Jones' initial commitment under D.C. Code §24-301(d) was constitutional.

Nor is it proper to frame the issue in terms of whether or not the initial commitment under §24-301(d) is punitive and therefore limited to the theoretical maximum prison sentence. The maximum length of time that an acquitee could have been incarcerated for the criminal offense is irrelevant because the acquitee has been found not guilty. Concepts of punishment are no longer applicable to him. By making the argument that the maximum length of

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insanity acquitees, and (2) placing the burden of proof, by a preponderance of the evidence, on the insanity acquitee when the burden of proof in civil commitment proceedings was on the government by clear and convincing evidence. While amicus believes that a resolution of these issues is unnecessary to a decision in this case, it has addressed the constitutionality of placing harsher procedural burdens on insanity acquitees as a result of a presumption of continuing mental illness and dangerousness in the event that the Court decides to reach the question.

incarceration governs the type of procedures that are constitutionally required, the petitioner concedes too much and protests too little. Indeterminate commitment of those who have been determined, through constitutionally valid procedures,[3/] to be mentally ill and dangerous, whether insanity acquitees or civil committees, is proper so long as there are constitutionally adequate procedures for periodic review and release. "Commitment must be

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3/ The initial commitment procedures cannot, consistent with due process, be punitive in nature because the individual has been found to be not criminally responsible. The state's interests following acquittal are the same as with other persons alleged to be mentally ill; treatment of the individual and protection of the community. Cf., Addington v. Texas, 441 U.S. 418 (1979). This determination must be made in strict conformity with the Due Process Clause. Vitek v. Jones, 445 U.S. 480 (1980). The court below correctly recognized that commitment of insanity acquitees cannot constitutionaly be based on considerations of punishment. It erred in holding that those procedures were constitutionally free of punitive effects.

justified on the basis of a legitimate state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding. Equally important, confinement must cease when those reasons no longer exist. O'Conner v. Donaldson, 422 U.S. 563, 580 (1975) (Burger, C.J., concurring) (emphasis added, cites omitted). Thus, an insanity acquitee must be released from confinement when he is no longer mentally ill or dangerous regardless of whether the maximum sentence that could have been imposed was one year or ten years, or whether that theoretical term has expired.

Taken to its logical conclusion, petitioner's argument would establish a quid pro quo of less stringent procedural protections for insanity acquitees in exchange for civil commitment procedures when the theoretical maximum prison term has ex-

pired. This approach flies in the face of the rationales underlying both civil commitment of the mentally ill and the plea of not guilty by reason of insanity. Moreover, it ignores the principal that persons found not guilty by reason of insanity are entitled to procedures substantially similar to those accorded civil committees. Bolton v. Harris, 395 F.2d 642, 651 (D.C. Cir. 1968); Powell v. Florida, 579 F.2d 324 (5th Cir. 1978); Dorsey v. Solomon, 604 F.2d 271 (4th Cir. 1979); Benham v. Edwards, 501 F. Supp. 1050 (N.D. Ga. 1980).

The maximum length of possible incarceration is relevant only as it relates to the underlying act. The state may legitimately have an interest in requiring stricter release procedures for someone who has been acquitted of a serious violent crime than for one who has been acquitted of a petty, non-violent offense. The release

procedures cannot, however, be harsher for one group of similarly situated individuals without some compelling state interest.

The equal protection issue is, therefore, properly framed as follows, "Can persons who have been committed as mentally ill and dangerous to themselves or others following acquittal by reason of insanity of petty, non-violent offenses be treated more harshly for purposes of release from hospitalization than persons committed as mentally ill and dangerous to themselves or others under the Civil Commitment Code?" Since the Court of Appeals did not address the true constitutional question, the judgment should be vacated and the case remanded for proper consideration.

II.

THE RELEASE PROCEDURES CONTAINED IN D.C. CODE §24-301(e) DEPRIVE PETITIONER OF THE EQUAL PROTECTION OF THE LAWS.

A. There Is No Rational Basis For Treating Persons Committed Following Acquittal By Reason Of Insanity Of Petty Offenses More Harshly For Purposes Of Release Than Persons Committed Under The Civil Commitment Code.

Should the Court decide to reach the question of the constitutionality under the Equal Protection Clause[4/] of the release procedures contained in D.C. Code §24-301(e), it must determine the proper standard of review. San Antonio Independent School District v. Rodriquez, 411 U.S. 1 (1973). However, the question of whether a heightened level of review is required can be avoided if it is determined that the procedures lack a rational basis.

The substantive standard for commit-

4/ This challenge is brought in the District of Columbia under the Fifth Amendment. That amendment incorporates an equal protection provision. Bolling v. Sharpe, 347 U.S. 497 (1954). The test applied is the same as that brought under the Fourteenth Amendment. Buckley v. Valeo, 424 U.S. 1, 93 (1976).

ment in the District of Columbia is the same for civil committees and insanity acquitees. Both must be mentally ill and likely to injure themselves or others if not hospitalized. Jones, at 372; D.C. Code §21-545(b). The procedures by which the determination is made and reviewed are quite different.

Civil committees have the right to immediate release without judicial intervention or approval whenever the hospital staff determines that they no longer meet the civil commitment criteria. D.C. Code §21-546. Civil committees are also entitled to periodic review of their need for continued hospitalization. D.C. Code §§21-546 and 548. Insanity acquitees, however, cannot be released except upon the approval of the committing court. D.C. Code §24-301(e). Even if the hospital staff certifies that the acquitee should be released

as no longer mentally ill or dangerous the government can object and demand a hearing. Insanity acquitees can therefore be involuntarily detained notwithstanding the opinion of the hospital staff that they are no longer in need of treatment. In contrast, the civilly committed are always released when the hospital makes such a determination. See, United States v. Ecker, 543 F.2d 1978, 1974 (D.C. Cir. 1976). The result of this difference in treatment is that insanity acquitees may be retained in the hospital even though they are no longer mentally ill or dangerous.

Amicus believes that there is no rational basis for applying these harsher release procedures to insanity acquitees who have been acquitted of petty, nonviolent offenses.[5] There is no principled

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5/ The question of what release procedures can constitutionally be applied to persons acquitted

way to distinguish between persons committed under the Mental Health Code and insanity acquitees charged with petty, non-violent offenses who were committed under D.C. Code §24-301(d). In fact, given the standard that committees must be both mentally ill and likely to injure themselves or others, there are undoubtedly many civil committees whose prior history poses a greater risk of dangerousness than do many insanity acquitees. Moreover, as discussed in greater detail infra, there are numerous civil committees who have committed criminal acts but who have avoided the criminal process through the exercise of prosecutorial or police discretion. See, Benham

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of serious violent crimes does not have to be decided. It is sufficient to note that for equal protection purposes a person acquitted of shoplifting cannot be equated with a person acquitted of murder, rape or armed robbery. See, United States v. Ecker, at 198 n.80.

v. Edwards, at 1069.

Given the lack of any real distinctions between the two classes, the rational relationship test is sufficient to dispose of the equal protection claim. However, should the Court deem the distinctions between the two groups to be rational, then it must consider whether a stricter level of scrutiny should be applied.

B. Strict Scrutiny Must Be Applied To This Legislative Classification Since It Infringes Upon The Fundamental Right To Liberty.

In analyzing the legislative classification as it related to the initial commitment, the court below applied only a rational basis test. Jones, at 372. The application of the lower standard resulted from the court's failure to determine whether a fundamental right was infringed by the procedures. Where such rights are involved, "they must be closely scrutinized and carefully confined." Harper v. Vir-

ginia Bd. of Elections, 383 U.S. 663, 670 (1965). The test that emerges from this scrutiny is whether the classification is "necessary to the achievement of a compelling state interest," Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972) (emphasis in original).

This heightened level of scrutiny has firmly established itself in the Court's analysis of equal protection claims, although its use is limited to those rights characterized as "fundamental" or those given express or implicit recognition in the Constitution. Shapiro v. Thompson, 394 U.S. 618, 642 (1968) (Steward, J., concurring). In an unbroken line of cases, the Court has recognized that confinement in prisons, prison-mental facilities, and mental health hospitals invades a basic and fundamental liberty interest. See, Baxstrom v. Herold, 383 U.S. 107 (1966);

Specht v. Patterson, 386 U.S. 605 (1967); Humphrey v. Cady, 405 U.S. 504 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); O'Connor v. Donaldson, 422 U.S. 563 (1975); Addington v. Texas, 441 U.S. 418 (1979); and, Vitek v. Jones, 445 U.S. 480 (1980).

This recognition has not lead to the use of a strict scrutiny test in any of the cases because the statutory schemes under review all fell to procedural due process challenges or were found violative of the Equal Protection Clause utilizing the rational basis test. See generally, German & Singer, Punishing the Not Guilty: Hospitalization of Persons Acquitted by Reason of Insanity, 29 Rutgers L. Rev. 1611 (1976); and, Kirschner, Constitutional Standards for Release of the Civilly Committed and Not Guilty by Reason of Insanity: A Strict Scrutiny Analysis, 20 Ariz. L. Rev. 233 (1978). It is too simplistic an

analysis to find, as the court below did in analyzing Baxstrom, that because this Court has never explicitly reached the issue the use of a lesser standard is required.

Although some lower courts have been reluctant to utilize the strict scrutiny standard, see, e.g., People v. McQuillan, 221 N.W.2d 569, 579 n.4 (Mich. 1974), the results of their analysis made it unnecessary. See, e.g., State v. Krol, 344 A.2d 289 (N.J. 1975). Further, not only has the strict scrutiny analysis for the deprivation of liberty interests never been rejected, this Court, in articulating the standard in Harper v. Virginia Bd. of Elections, cites as support its decision earlier that term in Baxstrom v. Herold. Harper, at 670.

Recently the United States Court of Appeals for the D.C. Circuit evaluated the

statutory scheme at issue here as it applied to persons found not guilty by reason of insanity in the District's federal courts. United States v. Cohen, No. 80-00382 (D.C. Cir., March 5, 1982). The court held the commitment procedures in D.C. Code §24-301 to be unconstitutional as violative of equal protection.[6] In reaching its conclusion, the court applied a strict scrutiny analysis based upon the fundamental liberty interest involved:

> Cohen's liberty is involved in this case. Because we are hard put to think of a constitutional right that is more fundamental, we readily conclude that a hard look must be taken at the provisions of the D.C. Code that require Cohen's commitment after his acquittal of the federal offense... (footnote omitted) Cohen, slip. op., at 6.

6/ The result of the decision in Cohen is that persons found not guilty by reason of insanity in the District's federal courts may not constitutionally be subjected to the §301 commitment and release procedures, whereas persons found not guilty by reason of insanity in the District's "local" courts may be so subjected.

Consistent with the long line of cases that correctly view commitment to a mental institution as a massive curtailment of liberty, this Court should apply strict scrutiny to the procedures under review. There being no compelling interest that can support the differences in procedures, the scheme should be struck down as it relates to those acquitted of petty offenses.

III.

DIFFERENCES BETWEEN THE PROCEDURAL PROTECTIONS ACCORDED INSANITY ACQUITEES AND THOSE COMMITTED UNDER THE D.C. CIVIL COMMITMENT CODE CANNOT BE JUSTIFIED ON THE BASIS OF A CONTINUING PRESUMPTION OF MENTAL ILLNESS AND DANGEROUSNESS.

A. The Presumption of Mental Illness and Dangerousness Fails to Meet the Constitutional Standard Established in Leary v. United States, 395 U.S. 6 (1969).

In sustaining the validity of the differences between the procedures applicable to the commitment of insanity acquitees and those applicable to civilly committed per-

sons, the Court of Appeals relied heavily on a presumption of continuing mental illness and dangerousness as applied to insanity acquitees. Jones v. United States, at 373-375. Under the court's analysis, denying the insanity acquitee the right to a jury trial and placing the burden of proof on the acquitee, disabilities not suffered by civil committees, are justified on the basis that the previous finding of not guilty by reason of insanity establishes a presumption that the acquitee is, at the time of the initial commitment hearing, both mentally ill and dangerous to himself or others. Commitability can therefore be justified by the acquitee's failure to rebut, by a preponderance of the evidence, the evidentiary presumption of present mental illness and dangerousness. Jones, at 375.

In order for this presumption to pass

constitutional muster under the Due Process Clause, it must be shown with "substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Leary v. United States, 395 U.S. 6, 36 (1969), accord, County Court of Ulster County v. Allen, 442 U.S. 140, 157-158, n.16 (1979); also see, Tot v. United States, 319 U.S. 463, 467 (1943).7/

7/ While Leary, Allen and Tot were criminal cases, the substantive standard established is applicable in the civil commitment context since the fundamental right to liberty is at stake in both proceedings. It is upon this basis that the lower federal courts have applied many of the procedural protections available in criminal trials to civil commitment proceedings. See, for example, In Re: Barnard, 455 F.2d 1370 (D.C. Cir. 1971) (right to a speedy hearing); Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968) (right to counsel). See generally, German & Singer, at 1020, and Commitment and Release of Persons Found Not Guilty by Reason of Insanity: A Georgia Prospective, 15 Ga. L. Rev., 1065, 1074 (1981). Moreover, this Court has held that in civil cases it is arbitrary and unconstitutional to deprive an individual of rights by employing a presumption which may be generally true

Thus, in order for the presumption to be constitutionally valid, it must be demonstrated with substantial assurance that it is more likely than not that a person who has sometime in the past been found to be not guilty by reason of insanity is currently both mentally ill and dangerousness. There is, however, no scientific basis for a presumption that a mental state that once existed in the past now exists in the present. Moreover, a presumption of present mental illness based on a previous finding of not guilty by reason of insanity ignores the different and distinct mental states that are applicable at different stages of the proceedings. Lastly, to presume that every criminal act equates with present danger to self or others is both overbroad

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of persons in the individual's class. See, Board of Education v. LaFleur, 414 U.S. 632, 644-646 (1974); Vlandis v. Kline, 412 U.S. 441 (1973).

and irrational.

(1) The Presumption of Continuing Mental Illness has no Scientific Basis.

A finding of not guilty by reason of insanity in the District of Columbia establishes that at the time of the commission of the offense, the defendant, because of mental disease or defect, lacked substantial capacity either to recognize the wrongfulness of his conduct or to conform his conduct to the requirements of law. Bethea v. United States, 365 A.2d 64 (D.C. App. 1976), cert. denied, 433 U.S. 911 (1977). Under the reasoning of the Court of Appeals in this case, that finding supports the evidentiary presumption that at the time of the commitment hearing the defendant has a psychosis or other disease which substantially impairs mental health, and that as a result the person is likely to injure himself or others. D.C. Code §21-545(b),

§24-301(d). This presumptive leap has no factual basis in medicine or psychiatry.

In the first place, the presumption ignores the passage of time and the benefits of treatment. In Michael Jones' case, nine months elapsed from his arrest to his initial commitment hearing. Jones, at 368. It is not unusual for more than a year to elapse from the time of arrest to the time of trial. See, cases cited in German & Singer, at 1018, n.32. Often, as in Jones' case, this time is spent in a mental health facility. To presume a continuity of mental condition is to assume that all mental states are static and unamenable to treatment. Moreover, the rapid and dramatic effect of psychotropic medications in relieving psychotic symptoms is well documented. See, L. Kolb and A. Noyes, Modern Clinical Psychiatry, 623-624 (8th ed. 1973). Whatever validity the presumption

may have had when it was first formulated prior to the mid-nineteenth century,[8/] that validity has been eclipsed by the development of modern psychiatry.

The record in Benham v. Edwards establishes the lack of any scientific foundation for the presumption. Dr. Lloyd Baccus, a professor of forensic psychiatry at Emory University, and Dr. Timothy Bullard, the director of forensic services at a state mental hospital, both testified that there is no medical basis for a presumption of continuing mental illness or dangerousness. Both rejected the presumption as contrary to all the advances that have been made in the treatment of the mentally ill. Benham, at 1068; Record, Vol. II, p.12-38. Dr. Baccus further testified that only by

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8/ See, Benham v. Edwards, 501 F. Supp. 1050, 1067 (N.D. Ga. 1980).

evaluating the specific individual can a proper determination be made as to whether or not that individual presently is mentally ill or dangerous.[9/] The Court of Appeals erred when it accepted the validity of the presumption without the benefit of any evidence to support it.

The rationality of the presumption is further undercut by the inability of psychiatrists to accurately associate mental illness and dangerousness. This Court has recognized the lack of certainty and fal-

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9/ Nor is there any reliable data showing that insanity acquitees are more likely to commit criminal acts after their release than are civil committees. In fact, the studies that have been done show that insanity acquitees have relatively low recidivism rates. For example, of the 150 insanity acquitees released in Michigan in 1974, only 2 were later prosecuted for felony offenses. Schwartz, Moving Backward Confidently, 54 Mich. S.B.J. 847, 848 (1975); also see, Pasewark, Pantle and Steadman, The Insanity Plea in New York, 1965-1967, 51 N.Y. S.B.J. 186 (1979); Sherman, Guilty But Mentally Ill, A Retreat From the Insanity Defense, 7 Amer. J. of Law and Medicine, 237 (1981).

libility in psychiatric diagnosis. See, Addington v. Texas, at 430-431. This observation is supported by a number of statistical studies that demonstrate the unreliability of psychiatric predictions of dangerousness. The findings of these studies consistently demonstrate that psychiatrists over-predict dangerousness. See, Diamond, The Psychiatric Prediction of Dangerousness, 123 U.Pa. L. Rev. 439, 444-447 (1974). For example, Professor Diamond, in analyzing the results of studies done following Baxstrom v. Hearld, states that:

> ...it is clear from the Baxstrom studies that of these 967 persons who had been convicted at one time of serious crimes, and who were designated as mentally ill and dangerous to others in order to justify their further confinement, only a very few were actually dangerous. One can only conclude that psychiatrists who make such judgments tended to over-predict dangerousness greatly, by a factor somewhere between ten and a hundred times the actual incidence of dangerous behavior. Diamond, at 447.

Psychiatrists cannot, with any degree of scientific certainty or reliability, predict the dangerousness of persons convicted of serious crimes even when they have examined and studied the individuals. A presumption of dangerousness arising from acquittal of a crime regardless of its severity has no validity at all.

(2) The Presumption of Mental Illness Ignores the Different and Distinct Mental States of Insanity for Criminal Responsibility, Competence to Stand Trial and Mental Illness for Purposes of Civil Commitment.

The presumption of continuing mental illness fails to recognize the different mental states required for a finding of not guilty by reason of insanity, competence to stand trial, and civil commitment. It treats the different mental states and the different legal standards and objectives that underlie them as though they were the same. Assuming the validity of the pre-

sumption at all, at best it can only be based on the type of mental state under consideration. An acquittal by reason of insanity in the District of Columbia is based upon the jury's determination that it is more likely than not that the defendant was insane at the time of the offense. The verdict does not speak to the defendant's present mental condition. Bolton v. Harris, at 646-650. Before the insanity acquitee can be civilly committed, the trial court must make a determination that the acquitee is presently mentally ill and likely to injure himself or others. See, Procedural Safeguards for the Involuntary Commitment of the Mentally Ill in the District of Columbia, 28 Cath. U. L.Rev., 855 (1979). Commitment, therefore, depends upon findings of fact different from those established by the jury's acquittal by reason of insanity. Powell v. Florida, 579

F.2d 324, 330 (5th Cir. 1978). A jury finding that at the time of the commission of a criminal offense, no matter how petty, the defendant lacked substantial capacity either to recognize the wrongfulness of his conduct or to conform his conduct to the requirements of law as a result of mental disease or defect does not equate with a finding that at the present time the defendant has a psychosis or other disease which substantially impairs mental health and that as a result the person is likely to injure himself or others.[10/]

10/ The disparity between the two findings is even more extreme in those jurisdictions that utilize the M'Naghten Rule and which have stringent standards for civil commitment. For example, in Georgia a defendant can be found not guilty by reason of insanity if at the time of the act the "person did not have the mental capacity to distinguish between right and wrong in relation to such act" or "because of mental disease, injury or congenital deficiency, acted as he did because of a delusional compulsion as to such act which overmasted his will to resist." Ga. Code §§26-702 and

Moreo er, the presumption of continuing mental illness lacks internal consistency. Assuming, arguendo, that the mental states are the same, the presumption ignores the fact that between the time of the commission of the offense and the date of the civil commitment hearing there has been an intervening finding that the defendant is competent to stand trial. A defendant who proceeds to trial, even for purposes of presenting an insanity defense, must have "sufficient present ability to consult with

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703. In order to be subject to involuntary civil commitment in Georgia, an individual must present "a substantial risk of imminent harm to himself or others as manifested by either recent overt acts or recent expressed threats of violence which present a probability of physical injury to himself or others, or (2) who is so unable to care for his own physical health and safety as to create an imminently life-endangering crisis." Ga. Code §88-501(v). Not only is mental incapacity to distinguish right from wrong not congruent with mental illness, it does not, by its own terms, constitute evidence that the individual presents a substantial risk of imminent harm to himself or others. See, Benham v. Edwards, at 1068.

his lawyer with a reasonable degree of rational understanding...[and must have] a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1950) (per curiam). Therefore, between the time of the commission of the alleged act and the civil commitment hearing, there has been a trial at which the defendant is mentally competent. Assuming that the three mental states are the same, as the presumption does, the presumption that a mental state once proven to exist continues until disproven would require a presumption of present sanity at the commitment hearing. The internal inconsistency of the presumption establishes that it is nothing more than a device of convenience designed to justify the lack of procedural protections for the commitment of insanity acquitees.

(3) The Presumption of Continuing Dangerousness is Overbroad Because it Assumes that All Criminal Acts Constitute a Danger to Self or Others.

The presumption as it relates to dangerousness assumes that the commission of a criminal act, sometime in the past and regardless of its nature, establishes that the person is presently likely to injure himself or others if not hospitalized. However, not all insanity acquitees have committed acts which constitute a likelihood of injury to themselves or others. Michael Jones' shoplifting of a coat is not the type of violent act which manifests a likelihood of injury to himself or other persons.

Some courts have held that any criminal act, no matter how petty and non-violent, equates with dangerousness to self or others. For example, in Overholser v. O'Beirne, 302 F.2d 852, 861 (D.C. Cir. 1962), the court stated that a "'bad check'

passer at large endangers himself by exposure to additional violations and additional arrests, trials and confinements, to say nothing of the serious effect on the public of his predatory tendencies." This extreme view was subsequently rejected by that court in a case holding that a trial court should consider the magnitude, likelihood, and frequency of the expected harm, rather than applying a blanket assumption that because the defendant had committed a criminal act in the past he is presently dangerous. Cross v. Harris, 418 F.2d 1095 (D.C. Cir. 1969).11/

11/ The common perception that the insanity defense is used almost exclusively for serious violent crimes is contrary to the facts. Statistics gathered in Georgia in response to the Benham litigation show that of the 127 insanity acquitees in Georgia mental hospitals on January 31, 1981, 79 had been acquitted of serious violent crimes and 48 had been acquitted of crimes other than serious violent crimes. Letter of Martin J. Rotter, Forensic Services Consultant, Division of Mental

The tendency of some courts to equate the commission of any criminal act with present dangerousness is an example of reification; the process by which an action or a behavior becomes translated into an attribute. It has rightly been rejected as an unsound and irrational process. One commentator has pointed out the danger of labeling persons based on prior events.

> For example, stealing is an action. To label a man who steals as a thief is to reify the action into an attribute. It implies that the man will continue to steal no matter what the situation, and that his thieving behavior is a consequence only of factors within him. For the same reason, one should not label a man who acts

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Health and Mental Retardation, Georgia Department of Human Resources, to Robert B. Remar, Attorney for Plaintiff, in Benham v. Edwards (May 5, 1981). The 48 included 7 acquitted of motor vehicle theft, 8 acquitted of criminal trespass, 8 acquitted of simple battery, 1 acquitted of reckless conduct, 1 acquitted of possession and sale of marijuana, 1 acquitted of prostitution, and 1 acquitted of obscene and abusive language. See, generally, German & Singer, at 1023.

> violently and causes harm as dangerous, for by so doing one has transformed an action into an attribute and has knowingly or unwittingly made the prediction that there will be future acts of violence, and that these future acts will be determined by qualities of the individual, not by the relationship or the circumstances. Although it may be convenient to label persons, to reify behavior into attributes, and thus to predict future conduct, it must be recognized that such a process has no scientific or logical basis and that there is no reason to expect that such predictions will come true. Diamond, at 449 (emphasis added).

The irrationality of labeling the insanity acquitee as mentally ill and dangerous is further highlighted by the fact that many civil committees have also committed criminal acts but have escaped the criminal justice system solely by virtue of the policeman's discretion. Most states allow a police officer to take an individual to a mental hospital for an emergency commitment where the police officer has probable cause for believing that the

individual is a mentally ill person requiring involuntary treatment. See, for example, Ga. Code §88-504.3 and D.C. Code §21-521. The exercise of this discretion by the police is not an unusual event. In fact, the policeman's decision to bring the mentally ill person to the hospital rather than the police station is "genuinely competitive with the criminal process." A. Goldstein, The Insanity Defense, 172 (1967). Other civil committees are diverted at the prosecutorial stage of the proceedings where, through the exercise of prosecutorial discretion, criminal proceedings are foregone in favor of civil commitment proceedings. See, Benham v. Edwards, at 1069, and case cited therein. There are thus substantial numbers of civil committees who have committed criminal acts but who have escaped the criminal justice process. No presumption of dangerousness

is applied to these individuals nor are they subjected to less stringent procedural protections.

The presumption of present mental illness and dangerousness, if left unrebutted, is sufficient to authorize the indeterminate commitment of the insanity acquitee. Like those committed under the Mental Health Code, the insanity acquitee is entitled, as a matter of both equal protection and due process of law, to a judicial determination which attains a greater degree of certainty than that generated by the scientifically unsupported presumption employed by the Court of Appeals in this case. This Court should reject the presumption of mental illness and dangerousness as a basis for applying harsher procedures in the commitment and release of insanity acquitees.

CONCLUSION

There is no principled way to distinguish between civil committees and insanity-acquitees charged with petty offenses. The two groups must, therefore, be treated similarly for purposes of determining suitability for release from confinement. If the Court reaches the issue, it should hold that as a matter of equal protection of the laws, Michael Jones must be accorded the release provisions of the D.C. Mental Health Code. The Court should not base its decision on the expiration of the hypothetical maximum prison sentence because, regardless of the length of sentence, commitment must cease when the reasons supporting it cease. The Court should also reject the presumption of mental illness and dangerousness as a justification for applying harsher procedures to insanity acquitees. The presumption is a 19th Cen-

tury aberration with no basis in fact or reason.

Respectfully submitted,

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ATTORNEYS FOR AMICUS

NO. 81-5195-CFX	TITLE Michael JONES, Petitioner v. United States

DOCKETED	COURT
Aug. 6, 1981	District of Columbia Court of Appeals

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Pro Se
	Counsel for Respondent: Solicitor General
Aug. 6, 1981	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.(Record filed).
Sept. 10, 1981	Order granting extension of time to file a response for respondent granted until 10/9/81.
Oct. 13, 1981	Order further extending time to file a response to the petition until Oct. 23, 1981.
Oct. 23, 1981	Order further extending time to file a response to the petition until Nov. 6, 1981.
Nov. 10, 1981	Brief for the U. S. in opposition filed.
Nov. 19, 1981	DISTRIBUTED. 12-4.
Dec. 7, 1981	REDISTRIBUTED. 12-11.
Jan. 4, 1982	REDISTRIBUTED. 1-8.
Jan. 11, 1982	The motion of petitioner for leave to proceed in forma pauperis and the petition for writ of certiorari are GRANTED.
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Feb. 23, 1982	Order extending time to file the peritioner's appendix and brief on the merits until March 27, 1982.
Mar. 24, 1982	Brief, amicus curiae, of Department of the Public Advicate, Division of Mental Health Advocacy, State of New Jersey filed.
March 25, 1982	Brief for the petitioner filed.
March 26, 1982	Brief, amici curiae, of The American Civil Liberties Union and The American Civil Liberties Union Fund of The National Capital Area in support of petition filed
March 26, 1982	Joint Appendix filed
March 29, 1982	Brief, amicus curiae, of Georgia Legal Services Program, Inc. filed.
Apr. 28, 1982	Order extending time to file the respondent's brief on the merits until May 28, 1982.
June 1, 1982	Order further extending time to file the respondent's brief on the merits until June 28, 1982.
	(Over)

81-5195

Title

No.

DATE	PROCEEDINGS AND ORDERS
June 28, 1982	Order further extending time to file the respondent's brief on the merits until July 12, 1982.
July 13, 1982	Order further extending time to file the respondent's brief on the merits until July 27, 1982.
July 13, 1982	Application for leave to exceed page limitations on respondent's brief on the merits and order granting same by Brennan, J., 7/13/82, not to exceed 68 pages.
July 22, 1982	Brief for respondent, United States, filed.
Aug. 25, 1982	CIRCULATED.
Oct. 20, 1982	Application for leave to file petitioner's reply brief on the merits in excess of page limitations, and order granting same by Burger, CJ., 10/22/82, not to exceed 25 pages.
Oct. 20, 1982	Reply brief for petitioner filed.
Nov. 2, 1982	ARGUED.